No. 92-1350

Supreme Court, U.S.
FILED
FEB 1 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IN RE GEORGE L. PARKER,

Petitioner,

v.

GILBERT S. MERRITT,
CHIEF JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT,
DAMON J. KEITH,
CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT, AND
PIERCE LIVELY,
SENIOR CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT,

Respondents.

PETITION FOR A WRIT OF PROHIBITION OR MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, THE HONORABLE CHIEF JUDGE GILBERT S. MERRITT, THE HONORABLE CIRCUIT JUDGE DAMON J. KEITH, AND THE HONORABLE SENIOR CIRCUIT JUDGE PIERCE LIVELY

CHARLES P. GOODELL, JR.
(Counsel of Record)
ERNEST G. BARNES
GERALDINE VALENTINO
GOODELL, DEVRIES, LEECH & GRAY
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201
(410) 783-4000

Attorneys for Petitioner

February 1, 1993

THE DAILY RECORD COMPANY, 11 EAST SARATOGA STREET, BALTIMORE, MD 21202

212 1P

QUESTIONS PRESENTED

The United States Court of Appeals for the Sixth Circuit in its August 17, 1992 Order, pursuant to Fed. R. Civ. P. 53(c), appointed a special master to conduct an investigation of possible prosecutorial fraud and, inter alia, to take the testimony of several present and former Department of Justice attorneys, including the Petitioner, George L. Parker. The questions presented are:

1. Whether the appointment of a special master pursuant to Fed. R. Civ. P. 53 is an inappropriate exercise of the inherent power of the Court of Appeals for the Sixth Circuit?

2. Whether the Court of Appeals for the Sixth Circuit should have remanded this matter to the United States District Court for the Northern District of Ohio where the underlying proceedings were initially heard?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PRAYER	1
OPINIONS BELOW	2
JURISDICTION TO REVIEW	5
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	13
I. George L. Parker Has Standing To Seek Review Of The Sixth Circuit Order Even Though Not A Named Party To The Proceeding	13
II. George L. Parker Has No Other Adequate Means To Attain The Denied Relief And The Right To Issuance Of The Requested Writ Is Clear	22
III. Appointment Of A Special Master Pursuant To Fed. R. Civ. P. 53 Is An Inappropriate Exercise Of The Court Of Appeals For The Sixth Circuit's Power . .	24

IV. The Court Of Appeals For The Sixth Circuit Should Have Remanded This Matter To The District Court 36

V. George L. Parker's Request For Issuance Of A Writ Of Prohibition Or Mandamus Is Not Moot 49

CONCLUSION 52

APPENDIX A-1

June 5, 1992 ORDER of the United States Court of Appeals for the Sixth Circuit A-1

June 18, 1992 ORDER of the United States Court of Appeals for the Sixth Circuit A-6

August 17, 1992 ORDER of the United States Court of Appeals for the Sixth Circuit Appointing the Honorable Thomas A. Wiseman, Jr. as Special Master A-9

Motion to Stay Subpoena Ad Testificandum filed by George L. Parker A-17

Motion to Rescind Order of August 17, 1992 Appointing a Special Master filed by George L. Parker A-24

Petitioner's Objection to George Parker's Motion to Stay the Subpoena A-58

Petitioner-Appellant's Statement in Opposition to George Parker's Motion to Rescind Order of August 17, 1992 . . . . . A-62

Order Denying George L. Parker's Motion to Stay Subpoena Ad Testificandum A-69

Order Denying George L. Parker's Motion to Rescind Order of August 17, 1992 Appointing a Special Master A-73

George L. Parker's Suggestion for Rehearing En Banc A-75

Motion to Stay the Subpoena Ad Testificandum or to Postpone the Hearing of November 12, 1992 . . A-83

Order Denying George L. Parker's Motion to Stay the Subpoena Ad Testificandum or to Postpone the Hearing of November 12, 1992 . . A-97

Petitioner's Response to Suggestions for Hearing and Rehearing En Banc by Mr. Norman A. Moscowitz and Mr. George Parker A-99

Respondents' Reply to George Parker's and Norman Moscowitz's Suggestions for Rehearing En Banc A-133

Petitioner's Motion to Strike Respondent's Reply to George Parker's and Norman Moscowitz's Suggestions for Rehearing En Banc A-141

Order Denying George L. Parker's and Norman A. Moscowitz's Petitions for Rehearing En Banc A-146

TABLE OF AUTHORITIES

PAGE

Cases:

Adventures in Good Eating, Inc. v. Best Places To Eat, Inc., 131 F.2d 809 (7th Cir. 1942) 28

Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089 (3d Cir. 1987) 29

Arthur Murray, Inc. v. Oliver, 364 F.2d 28, 32 (8th Cir. 1966), vacated on other grounds, 406 F.2d 1138 (8th Cir. 1969) 27

Association of Data Processing Service Organizations, 397 U.S. 150 (1970) 20

Bennerson v. Joseph, 583 F.2d 633, 642 (3rd Cir. 1978) 27, 29

Bradshaw v. Thompson, 454 F.2d 75 (6th Cir. 1972), cert. denied, 409 U.S. 878 (1972) 30

Bulloch v. United States, 763 F.2d 1115 (10th Cir. 1985), cert. denied, 474 U.S. 1086 (1986) 46

Burlington Northern RR. Co. v. Dept. of Revenue, 934 F.2d 1064, 1072 (9th Cir. 1991) . . . 28, 29

City of Cleveland v. Cleveland Electric Illuminating Co., 503 F. Supp. 368, 370 (N.D. Ohio 1980) 43

City of Los Angeles v. Lyons, 461 U.S. 95, (1983) 14

Demjanjuk v. Petrovsky, 612 F.Supp. 571 (N.D. Ohio 1985) cert. denied, 475 U.S. 1016 (1986) 45

EEOC v. Pan American World Airways, Inc., 897 F.2d 1499 (9th Cir. 1990), cert. denied, Keith v. EEOC, 111 S.Ct. 55 (1990) 18

Firefighter's Local 1784 v. Stotts, 467 U.S. 561 (1984) 52

Goss v. Lopez, 419 U.S. 565 (1975) . . . 47

H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115 (6th Cir. 1976) 41

Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944) 48

In re Bituminous Coal Operators Association, 949 F.2d 1165 (D.C. Cir. 1991) 6, 27, 29

In re Extradition of Demjanjuk, 603 F.Supp. 1468 (N.D. Ohio 1984) . 44, 45

In re Extradition of Demjanjuk, 584 F. Supp. 1321 (N.D. Ohio 1984) 42, 43

In re Irving-Austin Bldg. Corp., 100 F.2d 574, 577 (7th Cir. 1938) 30

In re United States, 816 F.2d 1083, (6th Cir. 1987) 29, 31, 32

In re Washington Post Co., 807 F.2d 383 (4th Cir. 1986) 21

Ingram v. Richardson, 471 F.2d 1268 (6th Cir. 1972) 34

Kenny v. Quigg, 820 F.2d 665 (4th Cir. 1987) 18

La Buy v. Howes Leather Co., 352 U.S. 249 (1957) . 5, 28, 29, 32-34

Los Angeles Brush Manufacturing Corp. v. James, 272 U.S. 701 (1927) 6

Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296 (1989) 22

Martin-Trigona v. Shiff, 702 F.2d 380 (2nd Cir 1983) 19

McCullough Tool Co. v. Cosgrave, 309 U.S. 634 (1940) 6

Organization for Reform of Marijuana Laws v. Mullen, 828 F.2d 536 (9th Cir. 1987) 6

Piper v. Hauck, 532 F.2d 1016, (5th Cir. 1976) 29

Polish National Alliance of the United States of North America v. N.L.R.B., 159 F.2d 38 (7th Cir. 1946) 35

Radio & Television News Association v. U.S. District Court, 781 F.2d 1443, 1445 (9th Cir. 1986) 20, 21

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) 26

S.E.C. v. Lincoln Thrift Association, 577 F.2d 600 (9th Cir. 1978) 19

S.E.C. v. Wencke, 783 F.2d 829 (9th Cir.), cert. denied, DeLusignan v. Gould, 479 U.S. 818 (1986) 19

Sibron v. New York, 392 U.S. 40 (1968) 51

Standard Oil Co. of California v. United States, 429 U.S. 17 (1976) 42

United States v. Demjanjuk, 103 F.R.D. 1 (N.D. Ohio 1983) . . . 39, 40

United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir. 1982), cert. denied, 459 U.S. 1036 (1982) 7, 37-39

United States v. Hooker Chemical & Plastics Corp., 123 F.R.D. 62 (W.D.N.Y. 1988) 35

United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978) 21

Universal Oil Co. v. Root Refining Co., 328 U.S. 575 (1946) 41, 46

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 473 (1982) 14

Virgin Islands Housing Authority v. David, 823 F.2d 764 (3rd Cir. 1987) 41

Weisman v. Charles E. Smith Management, Inc., 829 F.2d 511 (4th Cir. 1987) 41

West v. Radio Keith-Orpheum Corp., 70 F.2d 621 (2nd Cir. 1934) 18

Wilkin v. Sunbeam Corp., 405 F.2d 165 (10th Cir. 1968), cert. denied, 409 U.S. 1126 (1973) 42

Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) 47

Statutes:

8 U.S.C. § 1451 6

18 U.S.C. § 3184 44

28 U.S.C. § 1651 5

Federal Rules of Civil Procedure:

Rule 26, Federal Rules of Civil Procedure 38

Rule 53, Federal Rules of Civil Procedure . . . . . passim

Rule 60, Federal Rules of Civil Procedure 39

Miscellaneous:

Charles A. Wright & Arthur R. Miller, 9 Federal Practice and Procedure § 2504 34

Charles A. Wright & Arthur R. Miller, 15A Federal Practice and Procedure § 3902.1 17

Charles A. Wright & Arthur R. Miller, 16 Federal Practice and Procedure § 3938 48

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

In re GEORGE L. PARKER,
Petitioner,

v.

GILBERT S. MERRITT,
Chief Judge, United States Court
of Appeals for the Sixth Circuit,

DAMON J. KEITH,
Circuit Judge, United States Court
of Appeals for the Sixth Circuit, and

PIERCE LIVELY,
Senior Circuit Judge, United States
Court of Appeals for the Sixth Circuit,

Respondents.

PETITION FOR A WRIT OF PROHIBITION OR MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, THE HONORABLE CHIEF JUDGE GILBERT S. MERRITT, THE HONORABLE CIRCUIT JUDGE DAMON J. KEITH, AND THE HONORABLE SENIOR CIRCUIT JUDGE PIERCE LIVELY

PRAYER

The Petitioner, George L. Parker, respectfully prays that a writ of prohibition

or mandamus be issued to the United States Court of Appeals for the Sixth Circuit, the Honorable Chief Judge Gilbert S. Merritt, the Honorable Circuit Judge Damon J. Keith, and the Honorable Senior Circuit Judge Pierce Lively directing and commanding that the Court's Order of August 17, 1992 in Demjanjuk v. Petrovsky, Sixth Circuit Case No. 85-3435, be rescinded for further consideration by the Sixth Circuit for a more appropriate course of action.

OPINIONS BELOW

The following opinions have been entered in matters concerning John Demjanjuk: extradition proceedings: In re Extradition of Demjanjuk, 584 F. Supp. 1321 (N.D. Ohio 1984); In re Extradition of Demjanjuk, 603 F. Supp. 1463 (N.D. Ohio 1984); In re Extradition of Demjanjuk, 603 F. Supp. 1468 (N.D. Ohio 1985), dismissed, 762 F.2d 1012 (6th Cir. 1985); In

re Extradition of Demjanjuk, 612 F. Supp. 544 (N.D. Ohio 1985), habeas proceeding, Demjanjuk v. Petrovsky, 612 F. Supp. 571 (N.D. Ohio 1985), aff'd, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); and Demjanjuk v. Meese, 784 F.2d 1114 (D.C. 1986); denaturalization proceedings: United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir. 1982), cert. denied, 459 U.S. 1036 (1982); United States v. Demjanjuk, 103 F.R.D. 1 (N.D. Ohio 1983); United States v. Demjanjuk, No. C77-923 (N.D. Ohio Feb. 12, 1985) (unpublished opinion); United States v. Demjanjuk, 767 F.2d 922 (6th Cir. June 28, 1985) (unpublished opinion); and United States v. Demjanjuk, 762 F.2d 1012 (6th Cir. April 17, 1985) (unpublished opinion); deportation proceedings: In re Demjanjuk, A8 237 417 (Immigration Court May 23, 1984), aff'd,

(B.I.A. Feb. 14, 1985), aff'd, United States v. Demjanjuk, 767 F.2d 922 (6th Cir. 1985), cert. denied, 474 U.S. 1034 (1985); and Freedom of Information Act proceedings: Nishnic v. United States Department of Justice, 671 F. Supp. 771 (D.D.C. 1986), aff'd, 828 F.2d 844 (D.C. 1987) (unpublished opinion); Nishnic v. United States Department of Justice, Case No. 86-2802, 1990 U.S. Dist. LEXIS 809 (D.D.C. Jan. 26, 1990) (unpublished opinion).

Further, subsequent to the appointment of a special master, the following Orders, issued without accompanying opinions, were entered by the Sixth Circuit in relation to this Petitioner, George L. Parker[1]: October 30, 1992 Order Denying Motion to Stay Subpoena Ad

---

[1]See Appendix for motions and accompanying memoranda submitted by George L. Parker to the Court of Appeals for the Sixth Circuit and for subsequent Orders issued by the Court.

Testificandum (signed by Judge Wiseman); November 4, 1992 Order Denying Motion to Rescind Appointment of Special Master; November 10, 1992 Order Denying Motion to Stay Enforcement of the Subpoena or to Postpone November 12, 1992 Hearing; December 2, 1992 Order Denying Suggestion for Rehearing En Banc.

JURISDICTION TO REVIEW

The jurisdiction of this Court is invoked under Section 1651(a) of Title 28, United States Code. It is well-established that the extraordinary remedy of a writ of mandamus vacating reference to a special master is available when a court abuses the discretion allowed a court by Fed. R. Civ. P. 53. See La Buy v. Howes Leather Co., 352 U.S. 249 (1957). In La Buy, the Supreme Court upheld the supervisory control of the court of appeals over the district court and affirmed the use

of a writ of mandamus to vacate reference to a special master when the appointment of a special master is a clear abuse of discretion or "usurpation of judicial power". Id. at 257. See Los Angeles Brush Manufacturing Corp. v. James, 272 U.S. 701 (1927); McCullough Tool Co. v. Cosgrave, 309 U.S. 634 (1940); Organization for Reform of Marijuana Laws v. Mullen, 828 F.2d 536 (9th Cir. 1987); In re Bituminous Coal Operators Association, 949 F.2d 1165 (D.C. Cir. 1991).

STATEMENT OF THE CASE

On August 25, 1977 the United States Government through the Department of Justice filed a complaint in the United States District Court for the Northern District of Ohio pursuant to 8 U.S.C. § 1451(a) of the Immigration and Naturalization Act to revoke John Demjanjuk's certificate of naturalization. There was an extensive pre-

trial discovery period. Following a trial, Demjanjuk's naturalization was revoked. United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir. 1982), cert. denied, 459 U.S. 1036 (1982).

Subsequently, there have been numerous proceedings concerning Demjanjuk, including deportation, extradition, habeas corpus, and Freedom of Information Act proceedings. Ultimately, on February 27, 1987 Demjanjuk was extradited to Israel. In April 1988, the Israeli court found Demjanjuk guilty of crimes against the Jewish people, crimes against humanity, war crimes, and crimes against persecuted people at Treblinka and Sobibor Nazi camps. Currently, Demjanjuk's conviction is on appeal with the Supreme Court of Israel.

On June 5, 1992, the United States Court of Appeals for the Sixth Circuit, Chief Judge Merritt, Judge Keith and Judge Lively, after

review of the Court's earlier decision declining to stop the extradition of Demjanjuk by issuing a writ of habeas corpus, 776 F.2d 571 (6th Cir. 1985), and, based on a "previous study of the record" and "numerous recent press reports and articles in the United States", upon its own motion reopened the case. The court ordered the Respondent, United States Government, and Petitioner, John Demjanjuk, to file briefs in compliance with the issues set forth in the June 5, 1992 Order.

On June 18, 1992, the Sixth Circuit further requested the parties to brief additional information regarding the doctrine of specialty.

On August 11, 1992, the Court entertained oral argument pertaining to the issues set forth in the June 5 and June 18 Orders. On August 17, 1992, the Court, through Chief

Judge Merritt, Judge Keith and Judge Lively, appointed the Honorable Thomas A. Wiseman, Jr., Judge of the United States District Court for the Middle District of Tennessee, Special Master of the Court pursuant to Fed. R. Civ. P. 53(c). The Court failed to set forth any exceptional circumstances upon which the appointment of the Special Master was predicated. Pursuant to the August 17, 1992 Order, the Special Master was instructed to take the testimony of several government attorneys, including this Petitioner, George L. Parker.[2]

---

[2]George L. Parker began working for the Department of Justice's Special Litigation Unit of Immigration and Naturalization on May 1, 1978. On May 6, 1979, pursuant to a reorganization, the Special Litigation Unit was transferred to the Office of Special Investigations within the Criminal Division of the Department of Justice. George L. Parker transferred to the Office of Special Investigations and continued with the Department until his resignation effective on June 15, 1980. Accordingly, George L. Parker's involvement with the Demjanjuk case

On October 28, 1992, George L. Parker, through his personal counsel, filed with the Court of Appeals for the Sixth Circuit a Motion to Stay Subpoena Ad Testificandum and a Motion to Rescind Order of August 17, 1992 Appointing a Special Master with an accompanying memorandum of law. On October 30, 1992 Special Master, Judge Wiseman denied the Motion to Stay the Subpoena Ad Testificandum. Subsequently, on November 4, 1992, the United States Court of Appeals for the Sixth Circuit denied the Motion to Rescind the Appointment of a Special Master. On November 6, 1992 George L. Parker filed a Suggestion for Rehearing En Banc with the Sixth Circuit. Following, on November 10, 1992 George L. Parker filed a Motion to Stay

---

was limited to only a portion of the pretrial period of the denaturalization trial. Ultimately, the trial took place in February 1981.

the Subpoena Ad Testificandum or to Postpone the Hearings of November 12, 1992 before the Special Master until the Sixth Circuit had the opportunity to rule on his Suggestion for Rehearing En Banc. On the same day, November 10, 1992, the Motion to Stay or Postpone the hearings was denied. Finally, on December 2, 1992, the Sixth Circuit denied the Suggestion for Rehearing En Banc.

On November 12, 1992, because his Motion to Stay the proceedings was denied, and while his Suggestion for Rehearing En Banc was pending, George L. Parker appeared before the Special Master in Nashville, Tennessee. Prior to testifying, the Special Master granted George L. Parker's request that his appearance before the Special Master not be considered a waiver of any rights he had to pursue his objection to the proceedings as set forth in his then pending Suggestion for Rehearing En

Banc. Subsequently, further hearings were held before the Special Master in Nashville on January 14 and 15, 1993, and in Boston on January 29, 1993 to take the testimony of other present and former government attorneys. Future hearings are scheduled for February 5, 1993 in California. Additionally, counsel for Demjanjuk has already taken the depositions of several other witnesses and has indicated an intent to pursue further depositions following the February 5, 1993 hearing. The Government as well has noted its intent to take future depositions.[3]

---

[3]At the conclusion of the January 15 hearing, Judge Wiseman verbalized a desire to complete his investigation pursuant to the August 17, 1992 Order by the end of February.

REASONS FOR GRANTING THE WRIT

I. George L. Parker Has Standing To Seek Review Of The Sixth Circuit Order Even Though Not A Named Party To The Proceeding.

Petitioner, George L. Parker, brings this request for issuance of a writ of prohibition or mandamus before this Court to rescind the Sixth Circuit's reference to a special master because his individual rights may be violated or denied, and his reputation, his livelihood and his future in his chosen profession may be irrevocably and permanently harmed by the pending investigation initiated by the Sixth Circuit Court of Appeals.[4] Any finding of

---

[4]The Court of Appeals, in its Order of August 17, 1992, stated that "this court's inquiry concerns whether lawyers from the Department of Justice engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious Ukrainian guard known as 'Ivan the Terrible' who operated the gas chambers at the Treblinka, Poland Nazi death camp."

prosecutorial misconduct will affect Petitioner personally. Accordingly, given the imminent threat of real and immediate personal injury, George L. Parker possesses the requisite standing to have this Court entertain his request for issuance of a writ of prohibition or mandamus. See Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 473 (1982); see also City of Los Angeles v. Lyons, 461 U.S. 95, 101-05 (1983) (citations omitted).

Further, it is clear that the inappropriate appointment of a special master pursuant to Fed. R. Civ. P. 53 is the cause in fact of the above-mentioned threat of imminent personal harm. The Special Master, Honorable Judge Thomas A. Wiseman, Jr., has been given the authority to take the testimony of

---

Order, P. 1.

specified former and present government attorneys and receive such other evidence as he may determine to be relevant and material to the issue under submission. Subsequent to the investigation, Judge Wiseman is required to prepare a report and findings of fact which the Sixth Circuit must accept unless they find them to be clearly erroneous. Fed. R. Civ. P. 53(e)(2). Consequently, without being afforded either the full due process rights enjoyed by a party to judicial proceedings, or the express right to challenge the Sixth Circuit's failure to make findings of exceptional circumstances necessitating appointment of a special master, George L. Parker will be forced to abide by the Special Master's findings and any ensuing punishment or professional sequelae.

Issuance of a writ of prohibition or mandamus will remedy the above-mentioned

injury. Once the Sixth Circuit is instructed to refrain from continuing hearings before the Special Master, the Sixth Circuit panel can re-evaluate the circumstance surrounding this case and either explicitly set forth the exceptional circumstances upon which it bases the reference, or remand the investigation to the District Court for the Northern District of Ohio, the court before which the previously identified denaturalization and extradition hearings and trials were conducted, and, a fortiori, the court intimately familiar with the numerous factual and procedural intricacies of those proceedings. Further, if any prosecutorial misconduct occurred, it would have occurred in the first instance before that district court. Accordingly, issuance of this extraordinary remedy will protect the Petitioner from the random casting away of this matter to a special master who

has no familiarity with the previous ten years of litigation on the issues.

Although George L. Parker has never formally been named as a party to the instant matter,[5] he has been forced to maintain a formal and unsatisfactory relationship with the proceedings so as to be treated as a de facto party with standing to make limited objections to the proceedings. Cf. 15a Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §3902.1 (1992) (discusses circumstances by which a nonparty may bring an appeal). For instance, it is not uncommon for nonparties to be given the standing to appeal in certain circumstances

---

[5]The parties to the proceeding below are John Demjanjuk and the Department of Justice. The proceeding initiated by the Sixth Circuit's Order is, in actuality, an investigation where the demarcation between a party and a nonparty is, at least, blurred. Petitioner George L. Parker has as much at risk as the putative respondent, the Department of Justice.

where their interests are directly affected by the judgment of a court. In West v. Radio Keith-Orpheum Corp., 70 F.2d 621 (2nd Cir. 1934) Judge Learned Hand provided for the rights of a nonparty when he held that the nonparty creditor in the case should be given the right to appeal because he was brought into the suit at the invitation of the court and because there was no doubt but that the court's order affected his interests. Id. at 624. See also EEOC v. Pan American World Airways, Inc., 897 F.2d 1499, 1504 (9th Cir. 1990), cert. denied, Keith v. EEOC, 111 S.Ct. 55 (1990) (nonparties allowed to appeal where equities weigh in favor of hearing appeal, where nonparties participated in the agreement, and where the nonparties had a stake in the proceedings discernable from the record); Kenny v. Quigg, 820 F.2d 665 (4th Cir. 1987) (nonparty participant of employee

stock ownership plan granted right to appeal judgment of district court because of interest in litigation and active participation in the proceedings); S.E.C. v. Wencke, 783 F.2d 829 (9th Cir.), cert. denied, DeLusignan v. Gould, 479 U.S. 818 (1986) (shareholder holding 25% of the stock in a corporation, although a nonparty, was entitled to appeal from a district court's disgorgement order, because the court treated the shareholder as a party and equities weighted in his favor); Martin-Trigona v. Shiff, 702 F.2d 380 (2nd Cir 1983) (although nonparties, trustees in bankruptcy proceedings participated in the proceedings at the direction of the court and possessed a real interest in the litigation, and were found to have standing to bring an appeal); S.E.C. v. Lincoln Thrift Association, 577 F.2d 600 (9th Cir. 1978) (nonparty creditors allowed to appeal district court order).

Furthermore, nonparties have been granted the right to seek the extraordinary remedy of mandamus. Generally, nonparties have been afforded the right to seek a writ of mandamus when they can sufficiently allege both a personal "injury in fact," as well as a showing that the "interest to be sought is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Radio & Television News Association v. U.S. District Court of Southern California, 781 F.2d 1443, 1445 (9th Cir. 1986) quoting, Association of Data Processing Service Organizations, 397 U.S. 150 (1970). For instance, when a particular court order is perceived by the media as potentially violating the First Amendment, the media, although nonparties to the litigation at issue, has been granted standing to seek a writ of mandamus. See

Radio & Television News Association v. U.S. District Court, supra; United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978); In re Washington Post Co., 807 F.2d 383 (4th Cir. 1986).

George L. Parker will be denied constitutionally guaranteed due process of law unless permitted to challenge the appointment of the Special Master. Further, the Federal Rules of Civil Procedure, including Rule 53, were designed to protect the interest of civil litigants such as the Petitioner from abuse of discretion by both the courts and judicial officers. Accordingly, any argument that George L. Parker does not have standing is without merit because he stands to suffer a personal "injury in fact" and is within the "zone of interests" to be protected by the Federal Rules of Civil Procedure.

II. George Parker Has No Other Adequate Means To Attain The Denied Relief And The Right To Issuance Of The Requested Writ Is Clear

Petitioner requests this Writ of Prohibition or Mandamus be issued to the United States Court of Appeals for the Sixth Circuit as the only available and appropriate remedy to that Court's November 4, 1992 Order denying Petitioner George L. Parker's Motion to Rescind Order of August 17, 1992 Appointing a Special Master and the Court's December 2, 1992 Order Denying George L. Parker's Suggestion for Rehearing En Banc.

George L. Parker has no alternative means to attain the relief desired. No further proceedings are available before the Sixth Circuit to challenge the appointment of the Special Master. No other court is vested with the jurisdiction to exercise supervisory power over the Sixth Circuit. See Mallard v. United

States District Court for the Southern District of Iowa, 490 U.S. 296 (1989). Further, the Department of Justice, named Respondent in the hearings before the Special Master, as of this date has not availed itself of the opportunity to object to the appointment of the Special Master. Given the numerous attorneys called to give testimony before the Special Master, it is not feasible to expect the Department of Justice to represent effectively the respective individual interests of each attorney. Some of the attorneys called before the Special Master are still employed by the Department; and some, including Petitioner George L. Parker, are not. Consequently, in actuality the Department of Justice as Respondent has chosen to defend the interests of the Department itself, rather than to defend the individual interests of each attorney.

Accordingly, the government has approved the appointment of private counsel to represent the sole interests of each attorney called to give testimony. Given the extraordinary circumstances, it is only through his individual counsel that George L. Parker respectfully can request this Court to issue a writ of prohibition or mandamus to protect him from the Sixth Circuit's inappropriate appointment of a special master.

III. Appointment Of A Special Master Pursuant To Fed. R. Civ. P. 53 Is An Inappropriate Exercise Of The Court Of Appeals For the Sixth Circuit's Power.

The Court of Appeals for the Sixth Circuit, in its Order of August 17, 1992, stated that it was acting pursuant to its inherent power to grant relief for "after discovered fraud" when it appointed a special master pursuant to Fed. R. Civ. P. 53. By the

use of Fed. R. Civ. P. 53 in this instant matter as a procedural vehicle to investigate the issue of fraud, the Court must accept the Rule in its entirety.[6] The reference to a special master in this matter does not contemplate a jury; all determinations will be by the Special Master, Judge Wiseman. In these circumstances Rule 53 requires that reference to a special master "shall be made only upon a showing that some exceptional

---

[6]Rule 53 reads in pertinent part:

> [b] Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of accounting or difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a Special Master without regard to the provisions of this sub-division.

condition requires it". (emphasis added). The Court's Order discusses the basis of its concern that a fraud may have been committed during the lower court proceedings; however, the Court fails to set forth the "exceptional condition" which would authorize reference to a special master. The Court's failure to follow the literal requirements set forth by the Rule in its appointment of a special master is a clear abuse of judicial discretion by the Court.

Numerous court decisions have considered the exceptional circumstance requirement of Rule 53. The underlying holding in these cases severely circumscribes a court's discretion in appointing a special master. Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion. Roadway Express, Inc. v. Piper, 447 U.S. 752

(1980). It is clear that liberality is not intended to be afforded in any auxiliary references to a master in non-jury cases. Arthur Murray, Inc. v. Oliver, 364 F.2d 28, 32 (8th Cir. 1966), vacated on other grounds, 406 F.2d 1138 (8th Cir. 1969). Factual matters turning on credibility are not an exceptional circumstance warranting delegation to a master. Bennerson v. Joseph, 583 F.2d 633, 642 (3rd Cir. 1978). The court in In re Bituminous Coal Operators Assn., 949 F.2d 1165, (D.C.Cir. 1991), indicated that special masters can be used only when exceptional conditions exist and cannot be used to remove dispositive questions of fact and law from a judge. Courts have consistently agreed that complex issues create compelling reasons to deny reference to a special master and usually require the issue to be determined by a court and judge with experience on the issue. See

Burlington Northern RR. Co. v. Dept. of Revenue, 934 F.2d 1064, 1072 (9th Cir. 1991).

In the leading case on the use of discretion by courts in appointing special masters, La Buy v. Howes Leather Co., Inc., 352 U.S. 249 (1957), this Court reiterated that "[L]itigants are entitled to a trial by the court, in every case, save where exceptional circumstances are shown", citing, Adventures in Good Eating, Inc. v. Best Places To Eat, Inc., 131 F.2d 809, 815 (7th Cir. 1942). Assignment to a special master can deprive the parties of a trial before the court on the basic issues involved in the litigation. La Buy at 256. In La Buy the court also stated that court "congestion in itself is not such an exceptional circumstance as to warrant a reference to a master". Id. at 315. Additionally, the court went on to state that the terms "exception" and

"exceptional" as used in Rule 53 are not elastic terms. Id. at 314.

Courts of appeals have consistently applied La Buy to reverse orders of reference to special masters in a wide variety of non-jury trial proceedings, including contempt proceedings. See In re Bituminous Coal Operators Association, Inc., supra, (collective bargaining agreement dispute); Burlington Northern Railroad Co. v. Dept. of Revenue, supra, (temporary injunction proceeding); Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089, 1097 (3d Cir. 1987) (contempt proceeding); In re United States, 816 F.2d 1083, 1091 (6th Cir. 1987) (superfund cleanup case); Bennerson v. Joseph, supra, (action challenging conveyance); Piper v. Hauck, 532 F.2d 1016, 1019 (5th Cir. 1976) (prisoner's civil rights complaint).

Issues of fraud particularly are not proper subjects for reference to a special master. As stated by the Seventh Circuit as early as 1938 in In re Irving-Austin Bldg. Corp., 100 F.2d 574, 577 (7th Cir. 1938):

> "A fraud issue, ordinarily, is not a proper one for reference to a special master. Perhaps it would be better to say, -- issues in fraud hearings are not the proper subject for reference to a special master, save in extraordinary or exceptional cases. And exceptional means the rare -- the unusual case or circumstances. The rule is more than an academic pronouncement. It demands application."

The Sixth Circuit followed the above reasoning in Bradshaw v. Thompson, 454 F.2d 75, 80 (6th Cir. 1972), cert. denied, 409 U.S. 878 (1972), and determined that fraud is not an appropriate issue for reference to a special master:

> "The overall mandate of Rule 53(b) is that reference to a master is to be the exception and not the rule. Actions for fraud are particularly inappropriate for reference to a master, 'save in extraordinary or exceptional cases'."

The Sixth Circuit more recently, in In re United States, 816 F.2d 1083 (6th Cir. 1987), reaffirmed its position that utilization of special masters in non-jury cases to hear and report on the main issues in litigation has little support. Id. at 1087. The court dealt with the issue of whether reference to a special master was an abuse of discretion. The District Court for the Northern District of Ohio appointed a special master to review and submit recommendations on dispositive motions in an action instituted by the government under the Comprehensive Environmental Response Compensation Liability

Act. The Sixth Circuit rejected the district court's assertion that (1) calendar congestion, (2) complexity of the issues, (3) possibility of a lengthy trial, (4) the extraordinary pre-trial management required in a case with more than 250 parties, and (5) the public interest and the quickest feasible resolution of the super fund cases constituted exceptional circumstances so as to allow appointment of a master. The appointment was therefore an abuse of discretion. Id. at 1088.

The following language from the court's opinion is particularly instructive of the limitation on the discretion of courts in appointing special masters:

> "Commentators have observed that La Buy severely restricts the circumstances in which a reference will be proper in a nonjury case:

Though the La Buy Court was silent about what does constitute an exceptional condition, its rejection of the three most obvious matters claimed to constitute such a condition justifies the observation of Judge Kaufman that the utilization of special masters to hear and report on the main issues in litigation under Rule 53 has little support in the non-jury area. With a few minor exceptions, references in non-jury cases run counter to the spirit and purpose of judicial administration in the federal courts.

Even before the La Buy case courts frequently held that there was no exceptional condition justifying a reference, and they have done so much more consistently since that decision. A reference is still proper on matters of account and of damages.

The use of a special master to supervise discovery may still be

appropriate and useful in unusual cases.

Beyond the situations just described it is difficult to conceive of a reference of a nonjury case that will meet the rigid standard of the La Buy decision. This restrictive policy is necessary because reference of a nonjury case not only involves expense and delay but, since the master's findings must be accepted unless they are clearly erroneous, it also involves the danger that the master, not the court, will in fact decide the case."

9 C. Wright and A. Miller, Federal Practice and Procedure § 2504 (1971), at 789-91 (footnotes omitted) (quoting Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L. Rev. 452, 459 (1958)). See also, Ingram v. Richardson, 471 F.2d 1268, 1271 (6th Cir. 1972) (quoting Wright and Miller with approval in holding that reference to magistrate under Rule

> 53(b) was improper." (Footnote omitted). Id. at 1087.

See also, United States v. Hooker Chemical & Plastics Corp., 123 F.R.D. 62, 63 (W.D.N.Y. 1988) (reference to a special master is especially discouraged where the matters sought to be referred may be dispositive of basic issues involved in the litigation.); Polish National Alliance of the United States of North America v. N.L.R.B., 159 F.2d 38 (7th Cir. 1946) (Rule 53 by analogy applies to circuit court of appeals.)

The Sixth Circuit has failed to follow its own precedent and indeed, other established precedent as well. Since there are no exceptional circumstances in this matter, it is an abuse of discretion to appoint a special master to determine the sole issue in this case -- whether fraud was practiced before the court.

IV. The Court Of Appeals For the Sixth Circuit Should Have Remanded This Matter To The District Court.

The proceedings involving Demjanjuk have been ongoing for over a decade, primarily in the United States District Court for the Northern District of Ohio ("district court"). As the forum for the numerous proceedings, the district court is clearly better suited to review the multitude of facts and issues that will be presented during an investigation into alleged prosecutorial fraud. By referring this matter to a special master the court has ignored the district court where the alleged fraud allegedly occurred and has delegated to the Special Master responsibility to determine the basic issues involved in the proceeding.[7]

---

[7]Significantly, in the Sixth Circuit's initial order in this proceeding, Order dated June 5, 1992, the Court stated that the parties should brief "the question whether the court should remand the case to the district court for a further evidentiary hearing

Allegations similar to the ones now before the Special Master previously have been examined in the district court. First, following the denaturalization trial, but before the court rendered its decision, Demjanjuk made a motion for a new trial arguing that the government's failure to comply with pre-trial discovery prevented him from obtaining information necessary to the defense. United States v. Demjanjuk, 518 F. Supp. 1362, 1384 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir. 1982), cert. denied, 459 U.S. 1036 (1982). Demjanjuk's allegations were based on the government's failure to provide five statements from Soviet witnesses who were present at the Trawniki training camp in 1942. The government received the statements shortly before trial, and the witnesses were interviewed by the Soviet

---

respecting the case."

government, not the Department of Justice. Demjanjuk contended that the government had a duty to provide the names of the Soviet witnesses by supplementing interrogatories according to Fed. R. Civ. P. 26(e)(1)(A), and failure to do so was cause for a new trial.

The district court held that the government had a duty to disclose Dorofeev's statement, a witness who remembered Demjanjuk from Trawniki and identified two photos of him. However, the district court explicitly stated that it did not "ascribe any sinister motivation . . ." to the Government's conduct and, moreover, the district court held that Dorofeev's statement was not of "such a nature as to alter the outcome of the case." Id. at 1384, n.52. Further, the district court held that the government did not breach a duty with respect to the remaining five Soviet witnesses who had no recollection of Demjanjuk. Id. at

1384-85. Having just heard all of the denaturalization testimony, the court determined that the five Soviet statements would have been cumulative and as such would not have produced a different result in the denaturalization trial. Id. at 1386.

Second, subsequent to the motion for a new trial, Demjanjuk proceeded to bring a motion to vacate the decision to revoke his certificate of naturalization. See, United States v. Demjanjuk, 103 F.R.D. 1 (N.D. Ohio 1983). Because the motion was made more than one year after the denaturalization proceeding, the court ruled that the allegation of fraud upon the court pursuant to Fed. R. Cir. P. 60(b)(6) was the only method by which the prior judgment would be vacated.

Demjanjuk's allegations of fraud were based on affidavits submitted by German Guard Otto Horn, Trawniki camp paymaster Heinrich

Schaefer, and Demjanjuk's counsel O'Connor. The alleged fraud included submission by the government of perjured statements by Horn and Schaefer at trial, and allegations that the Department's Office of Special Investigation (OSI) collaborated with the Soviet government to conceal the perjury. Id. at 8. In proceeding with the motion, familiarity with all of the evidence previously presented at the denaturalization trial bestowed the knowledge necessary for the district court to conclude that the new information did not differ materially from testimony already considered by the court. Id. at 5. Hence, in the absence of new substantiated evidence, the court refused to vacate the judgement.

It is altogether fitting that the court before which the instant alleged fraud occurred, not a special master unfamiliar with the underlying litigation, be designated the

appropriate forum to investigate the issue of fraud. "[T]he proper forum in which to assert that a party has perpetrated a 'fraud on the court' is the court which allegedly was a victim of that fraud." Weisman v. Charles E. Smith Management, Inc., 829 F.2d 511, 513 (4th Cir. 1987), citing Universal Oil Co. v. Root Refining Co., 328 U.S. 575, 580-81 (1946). See also Virgin Islands Housing Authority v. David, 823 F.2d 764, 767 n.6 (3rd Cir. 1987), citing, H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1122 (6th Cir. 1976) (an experienced trial judge is in the best position to know whether fraud has been perpetrated in his or her court.) If fraud was practiced, it was in the proceedings before the district court; nothing additional happened before the Sixth Circuit. The district court not only has familiarity with prior claims of fraud but in fact has gained

extensive experience in its role as primary fact-finder with respect to the multiple issues which arose in respect to the denaturalization and extradition proceedings. For these reasons, the district court constitutes the preferable forum for investigating whether the government committed a fraud on the court.[8]

In March of 1984 in In re Extradition of Demjanjuk, 584 F. Supp. 1321 (N.D. Ohio 1984), recusal proceedings against Judge Frank J. Battisti were initiated in the district court. A decision on the motion for recusal required an in-depth analysis of the affidavits submitted in support of the motion, as well as

---

[8] "Indeed, the trial court 'is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)'." Standard Oil Co. of California v. United States, 429 U.S., 17, 19 (1976) citing Wilkin v. Sunbeam Corp., 405 F.2d 165, 166 (10th Cir. 1968), cert. denied, 409 U.S. 1126 (1973).

an in-depth analysis of any potential bias or prejudice on the part of the judge. In concluding that there was no need for a recusal, the court pointed out the importance of having someone familiar with the history of a pending matter continue to preside over the case. Id. at 1331. Therefore, in the absence of any evidence that the judge was biased, the court indicated it was necessary not to "waste judicial resources that have already been invested in the proceeding, . . . [especially] in instances where . . . as here a single judge has acquired by experience, familiarity with a protracted involved case which could not easily be passed to a second judge. (citation omitted.)" Id. at 1332. citing City of Cleveland v. Cleveland Electric Illuminating Co., 503 F. Supp. 368, 370 (N.D. Ohio 1980). Similar to the recusal decision, the Sixth Circuit should not waste judicial

resources until it substantiates with credible evidence reasons why the district court is not the appropriate forum for the investigation of the alleged fraud.

Further, the array of related issues entertained in the district court included hearings to clarify what issues were proper for presentation during the extradition hearing. In re Extradition of Demjanjuk, 603 F.Supp. 1468 (N.D. Ohio 1984). Additionally, the jurisdiction of the district court to hold extradition hearings was challenged with the contention that only a military tribunal would have jurisdiction. In re Extradition of Demjanjuk, 603 F.Supp. 1468 (N.D. Ohio 1985). After a review and analysis of 18 U.S.C. §3184 and the 1963 Extradition Treaty between the United States and Israel, the district court found that it did have jurisdiction to

entertain the extradition proceeding. Id. at 1469-1472.

Finally, after deciding in favor of extradition, the district court denied habeas corpus relief to Demjanjuk. Demjanjuk v. Petrovsky, 612 F.Supp. 571 (N.D. Ohio 1985) cert. denied, 475 U.S. 1016 (1986). The Sixth Circuit's decision on appeal to confirm this denial is the decision underlying the Court's proposed investigation of fraud. See Order of August 17, 1992.

Any investigation of alleged fraud before the district court will require a thorough examination and understanding of the extensive record in the numerous proceedings before the district court. Given the years and experience invested with the district court in the past proceedings, this instant matter should be remanded to the district court with instructions. The investigation should be in

the hands of the affected district court where adversary proceedings with full regard for due process will be assured.[9] "'Where a person's

---

[9]The law is clear that "the usual safeguards of adversary proceedings must be observed". Universal Oil Products Co. v. Root, 328 U.S. 575 (1946); see also, Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985) cert. denied, 474 U.S. 1086 (1986). It is clear that the former and present government attorneys have been denied the safeguards of an adversarial proceedings. Special Master Judge Wiseman at the September 4, 1992 hearing indicated that he would receive marked evidence, and question the witnesses, but did not anticipate cross-examination by Petitioner's counsel. Following, on November 12, 1992, at the beginning of the hearing, Judge Wiseman reversed himself and stated that he would indeed allow personal counsel for the witnesses to propound questions at the conclusion of the examination. The reversal of position by the Special Master provided insufficient notice for personal counsel to adequately and effectively prepare. Indeed, some of the personal counsel for the witnesses had not yet been issued exhibit books from which to prepare questions. Subsequently, on January 15, 1993 during further hearings, Judge Wiseman once again reversed himself and instructed that personal counsel representing the former and present government attorneys could only question the witness by propounding questions through the Department of Justice attorney. Obviously, requiring the use of the

good name, reputation, honor, or integrity is at stake because of what the government is doing to him', the minimal requirements of [due process] must be satisfied." Goss v. Lopez, 419 U.S. 565, 573 (1975), citing, Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). The time and expense it will take to educate a fact finder in another forum, the Middle District of Tennessee, is not justified absent specific exceptional circumstances.

---

government attorney as a vehicle for personal counsels' questions serves no purpose as effective lawyering demands the right to respond and probe the witness's answers spontaneously.

Judge Wiseman also has permitted Demjanjuk's attorneys special privileges in determining the course of the investigation by the Special Master. In fact, counsel for Demjanjuk has taken on a "prosecutorial" role and directed the course of the investigation. Demjanjuk's counsel has been allowed to pick and choose which witnesses to call as well as been given complete discretion to choose what documentary evidence will be placed in the exhibit books for presentation of their allegation of fraud to the Special Master.

Even if the time and expense are warranted, given the extensiveness of the prior proceedings and the complexity and extensiveness of the anticipated proceeding, it is unlikely that the wealth of knowledge already contained in the district court can be re-created with the appointment of a special master.

In Hazel-Atlas the Supreme Court left open the question of whether hearings related to allegations of fraud on the court might be better conducted by a district court. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 250 n.5 (1944). See generally 16 Charles A. Wright and Arthur R. Miller, Federal Practice & Procedure §3938 (1977 & Supp. 1992). In the instant case where the fraud is alleged to have occurred before the district court in the denaturalization and extradition proceedings, it is clear that any

investigation of prosecutorial fraud is better suited to the district court where the alleged fraud initially occurred.

V. George Parker's Request For Issuance Of A Writ of Prohibition Or Mandamus Is Not Moot

George L. Parker's request for issuance of a writ of prohibition or mandamus is not moot. Although George L. Parker testified before the Special Master on November 12 and 13, 1992, the controversy regarding the Court's abuse of discretion in appointing a Special Master in the absence of exceptional circumstances was not terminated. The Special Master, through the month of February, will continue to entertain hearings and gather evidence pursuant to the August 17, 1992 Order. Further, the Special Master will not prepare his report of findings until after all the testimony has been taken and the time allowed for the filing of findings of fact and

law as well as substantive briefs has passed.[10] Ultimately, pursuant to Rule 53(e)(2), findings of fact submitted by the Special Master must be accepted by the Court unless clearly erroneous. Therefore, any finding of prosecutorial misconduct will affect George L. Parker's reputation, his livelihood and his future in his chosen profession. Accordingly, the mere fact that George L. Parker has testified does not constitute an abatement of the issue and the requisite controversy will continue until the Special Master has completed his duties and

---

[10]During the January 15, 1993 hearing, Judge Wiseman indicated he would allow each party, as well as personal counsel for each former and present government attorney, an opportunity to submit briefs prior to his filing of a report with the United States Court of Appeals for the Sixth Circuit.

the issues set forth in the August 17, 1992 Order are resolved.[11]

Moreover, even if the Court of Appeals refuses to stay the proceedings and the Special Master issues his report of findings before this Court has the opportunity to entertain this Petition, the issue will not be moot. George L. Parker will suffer collateral injuries as a result of any finding of prosecutorial misconduct by the Special Master. See Sibron v. New York, 392 U.S. 40, 53-55 (1968) (criminal defendant had completed his sentence but court held challenge to conviction was not moot because "the obvious fact of life [is] that most criminal convictions do in fact entail adverse collateral legal consequences"); see also

---

[11]Simultaneously with the filing of this Petition for Writ of Prohibition or Mandamus, George L. Parker has filed a Motion to Stay the proceedings in Demjanjuk v. Petrovsky with the Court of Appeals for the Sixth Circuit.

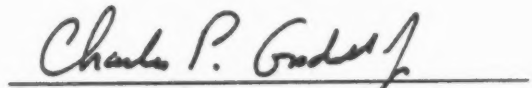
Firefighter's Local 1784 v. Stotts, 467 U.S. 561, 571-72 (1984). George L. Parker will be adversely affected, both personally and professionally, immediately and for an extended, if not permanent, period of time by any finding of prosecutorial misconduct. Accordingly, even if the Special Master issues a report, this matter is not rendered moot because some injury will remain that could be redressed by a favorable decision from this Court.

CONCLUSION

For the reasons stated herein, Petitioner, George L. Parker, respectfully requests this Petition for Prohibition or Mandamus be granted and the case of Demjanjuk v. Petrovsky, et al., Sixth Circuit Case No. 85-3435, be remanded to the United States Court of Appeals for the Sixth Circuit for its consideration of a more appropriate course of

action consistent with the requirements of Fed. R. Civ. P. 53.

Respectfully submitted,



Charles P. Goodell, Jr.
(Counsel of Record)
Ernest G. Barnes
Geraldine Valentino
GOODELL, DEVRIES, LEECH
& GRAY
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201
(410) 783-4000

No. 85-3435

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
JOSEPH PETROVSKY, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	

Before: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

The petitioner-appellant, John Demjanjuk, was extradited to the State of Israel for trial of a capital offense, the commission of war crimes during World War II. In a previous decision of this court in this case, 776 F.2d 571 (6th Cir. 1985), we declined to stop the extradition by issuing a writ of habeas corpus. Our previous study of the record and numerous recent press reports and articles in the United States indicate that the

extradition warrant by the Executive Branch may have been improvidently issued because it was based on erroneous information. Consideration should be given to its validity and to whether the court's refusal to grant the petition for writ of habeas corpus was erroneous.

In our previous decision we said that the extradition should be limited:

> The district court clearly certified that Demjanjuk was subject to extradition solely on the charge of murder. Though some of the acts which Demjanjuk is charged with may also constitute other offenses listed in the treaty, he may be tried in Israel only on that charge.

776 F.2d at 583.

Pursuant to the authority stated in Rule 40, Fed. R. App. P., pertaining to the rehearing of causes previously heard and Rule 60(b)(6), Fed. R. Civ. P., pertaining to relief from judgments previously entered, the Court, upon its own motion, makes the

following orders with respect to the prior proceedings concerning the extradition warrant heretofore issued in this case under Chapter 209, Title 18 (§§ 3181-3195), United States Code:

1. The United States, on or before July 15, 1992, shall file with the Court a brief describing any items of evidence of any kind, of which it has knowledge, tending to show that the petitioner-appellant, Demjanjuk, is not the "Ivan the Terrible" who committed war crimes at the Treblinka death camp, in particular murder, as described in 76 F.2d 571 (6th Cir. 1985), together with a statement of approximately when agents of the United States first learned of each such item of evidence.

2. On or before July 25, 1992, the petitioner-appellant shall file a brief describing affidavits, depositions or other statements of witnesses in his possession

(which are not described in the government's brief referred to in paragraph 1 above), which tend to show that a man known as Ivan Marchenko was the "Ivan the Terrible" referred to in paragraph 1.

3. On or before August 1, 1992, the parties should file simultaneous briefs stating their respective position on the question whether the Court should reconsider its earlier decision concerning the issuance of a writ of habeas corpus in this case, including the question whether the court should remand the case to the district court for a further evidentiary hearing respecting the case.

4. The Federal Public Defender for the Northern District of Ohio is hereby appointed to represent the defendant, provided the petitioner-appellant or the members of his immediate family in the United States do not

object to such appointment, and provided further that he is qualified for such representation under 18 U.S.C. § 3006A.

5. An oral hearing on this matter is set for Tuesday afternoon, August 11, 1992, at 2:30 P.M.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

FILED

JUN 05 1992

LEONARD GREEN, Clerk

No. 85-3435

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
JOSEPH PETROVSKY, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	

Before: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge

In our Order of June 5, 1992, this Court noted that the petitioner-appellant, John Demjanjuk, was extradited to Israel to stand trial solely for the charge of murder at the Treblinka death camp. In light of possible new evidence that Demjanjuk is not "Ivan the Terrible," the Court hereby supplements its Order as follows:

6. The parties are to brief their respective position on this question of international law: "What role, if any, should the Doctrine of Specialty play were this Court to reconsider the validity of the extradition warrant previously issued?" See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Ch. 7 at 557-58 (1987) ("The requested state retains an interest in the fate of a person whom it has extradited, so that if, for example, he is tried for an offense other than the one for which he was extradited, or is given punishment more severe than the one applicable at the time of the request for extradition, the rights of the requested state, as well as of the person are violated.") & § 477, at 579 ("The doctrine of specialty is designed to prevent prosecution for an offense for which the person would not have been extradited . . . . Both the person

extradited and the extraditing state are beneficiaries of the doctrine.").

The parties should address this question in their briefs due on or before August 1, 1992. See Order, June 5, 1992, ¶3, at 2.

ENTERED BY ORDER OF THE CLERK

/s/
Leonard Green, Clerk

FILED

JUN 18 1992

LEONARD GREEN, Clerk

No. 85-3435

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
JOSEPH PETROVSKY, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	

Before: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

Pursuant to orders of this court entered on June 5, 1992 and June 18, 1992, counsel for the parties appeared for oral argument after having previously filed briefs and appendixes. At the commencement of oral argument the panel, speaking through Chief Judge Merritt, stated that the essential issue joined by the

parties in their briefs is whether this court mistakenly affirmed the district court's denial of John Demjanjuk's habeas corpus petition. See Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986). The Chief Judge then stated that the court's inquiry concerns whether lawyers from the Department of Justice engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious Ukrainian guard known as "Ivan the Terrible" who operated the gas chambers at the Treblinka, Poland Nazi death camp. The "bedrock question" for the court, Judge Merritt continued, is whether the failure of the attorneys to disclose such exculpatory information constituted fraud upon the court

that misled this court into allowing Demjanjuk to be extradited.

The case was ably and extensively argued by counsel and, at the conclusion of oral argument, was taken under submission by the court. Upon consideration the court concludes that further proceedings are required as set forth here.

I.

Before outlining the additional proceedings, we dispose of the Department of Justice's contention that this court lacks jurisdiction to conduct the present inquiry. The Department argues that we have no power to review our 1985 judgment, particularly in view of the fact that Demjanjuk is now is Israel, having been convicted by an Israeli court for violation of Israeli law. We disagree. This court is proceeding under its inherent power to grant relief, for "after-discovered fraud,"

from an earlier judgment "regardless of the term of [its] entry." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944). Furthermore, nothing requires this court to follow the "cumbersome and dilatory procedure" of sending this issue back to the district court for decision. Id. at 249.

The fact that a federal court has the inherent power "to vacate its own judgment upon proof that a fraud has been perpetrated upon the court" was reaffirmed by the Supreme Court at its 1990 term. See Chambers v. NASCO, Inc., 111 S.Ct. 2123, 2132 (1991). The Court warned that, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." Id. Mindful of this admonition, we have determined to make every effort to be certain that we have as complete a record as possible before acting

upon the serious charges made by the petitioner in this case.

II.

Counsel for the Department of Justice conceded that "mistakes were made." This admission was based upon the undisputed fact that the Department had in its possession prior to the extradition proceedings statements and documents indicating that John Demjanjuk was not "Ivan the Terrible," but that another Ukrainian guard at Treblinka, Ivan Marchenko, was the operator of the gas chambers whom the prisoners referred to by this sobriquet.

It is alleged by the petitioner that this information was known to attorneys within the Department of Justice who were involved in the Demjanjuk denaturalization, deportation and extradition proceedings, but that none of the information was produced to Demjanjuk's

counsel in response to numerous interrogatories and requests, or revealed to the court. The attorneys so identified at this time are Allan Ryan, Norman Moscowitz, George Parker and John Horrigan. The first three worked within the Department in its Office of Special Investigations (or its predecessor), while Horrigan served as an assistant United States Attorney for the Northern District of Ohio. All four attorneys were involved in the proceedings against John Demjanjuk.

III.

In order to procure information that we deem essential for reaching a decision on the issue before us, the court hereby appoints the Honorable Thomas A. Wiseman, Jr., Judge of the United States District Court for the Middle District of Tennessee, as Special Master of this Court pursuant to Fed. R. Civ. P. 53(c).

This reference requires the Master to take the testimony of attorneys Ryan, Moscowitz, Parker, and Horrigan, if available, and to receive such other evidence as he may determine to be relevant and material to the issue under submission. The Master shall have all of the powers granted to such officers under Fed. R. Civ. P. 53(c). After completing his duties pursuant to this order of reference, the Master will prepare a report on the matters covered by this order. He will file the report with the clerk of this court and serve on each party notice of the filing and a copy of the report together with a transcript of all proceedings and of the evidence and any original exhibits as provided in Fed. R. Civ. P. 53(c).

Entered by order of the court.

By: /s/
Leonard Green, Clerk

FILED

AUG 17 1992

LEONARD GREEN, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN DEMJANJUK	*	
Petitioner	*	
v.	*	Case No. 85-3435
JOSEPH PETROVSKY, et al.	*	
Respondents	*	

* * * * * * * * * *

MOTION TO STAY SUBPOENA AD TESTIFICANDUM

George Parker, by his attorneys, Charles P. Goodell, Jr., and Goodell, DeVries, Leech & Gray, moves pursuant to Federal Rule of Civil Procedure 45 for an order to stay enforcement of the subpoena for his personal appearance before the Special Master on November 12, 1992. The following is stated in support of the Motion:

1. George Parker, Petitioner, has been issued a subpoena pursuant to the Sixth Circuit Court of Appeals August 17, 1992

Order, whereby the Honorable Thomas A. Wiseman, Judge of the United States District Court for the Middle District of Tennessee, was appointed Special Master to conduct an investigation to determine if a fraud had been perpetrated on the Court.

2. Currently, Petitioner, by counsel, has filed a Motion to rescind the Order of August 17, 1992 appointing a special master.[1] If the Motion to the Sixth Circuit is granted, the Special Master will be without jurisdiction to entertain hearings in this matter, thereby rendering the instant subpoena invalid.

3. Petitioner's individual rights may be violated or denied, and his reputation, his livelihood, and his future in his chosen profession and otherwise irrevocably and

---

[1] A copy of the Motion is attached as Exhibit 1.

permanently harmed by complying with the subpoena to appear before a special master, whose assignment pursuant to Federal Rule of Civil Procedure 53(b), constitutes an abuse of discretion by the Sixth Circuit.

4. The motion to stay is timely. George Parker's appearance is not requested until November 12, 1992.

WHEREFORE, George Parker, through his attorneys, respectfully requests this Court stay the enforcement of the subpoena until the Sixth Circuit has ruled on the Motion to Rescind Appointment of a Special Master.

Charles P. Goodell, Jr.

Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, MD 21201
(410) 783-4000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October, 1992, a copy of the Motion to Stay Subpoena Ad Testificandum and Memorandum of Law in Support of Motion to Stay Subpoena Ad Testificandum were mailed, postage prepaid, to the following:

Dana Biehl
Deputy Chief, Violent Crimes
and Terrorism Section
Department of Justice
P.O. Box 7179
Washington, D.C. 20044-7179

Edward F. Marek
Federal Public Defender
Northern District of Ohio
Skylight Office Tower - Suite 750
1660 West 2nd Street
Cleveland, OH 44113

Michael E. Tigar
School of Law
University of Texas at Austin
727 E. 26th Street
Austin, TX 78705

Honorable Thomas A. Wiseman, Jr.
United States District Court
for the Middle District of Tennessee
824 U.S. Courthouse
801 Broadway
Nashville, TN 37203

Charles P. Goodell, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN DEMJANJUK	*	
Petitioner	*	
v.	*	Case No. 85-3435
JOSEPH PETROVSKY, et al.	*	
Respondents	*	

* * * * * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO STAY THE SUBPOENA AD TESTIFICANDUM

George Parker, by his attorneys, Charles P. Goodell, Jr., and Goodell, DeVries, Leech & Gray, in support of his Motion To Stay Subpoena Ad Testificandum requiring his personal appearance in the Middle District Court of Tennessee on November 12, 1992, relies on Federal Rule of Civil Procedure 45, and by reference incorporates the attached Memorandum of Law in Support of the Motion to Rescind the Order of August 17, 1992 Appointing a Special Master. (See Exhibit 1).

Charles P. Goodell, Jr.

Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, MD 21201
(410) 783-4000

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN DEMJANJUK	*	
Petitioner	*	
v.	*	Case No. 85-3435
JOSEPH PETROVSKY, et al.	*	
Respondents	*	

* * * * * * * * * *

MOTION TO RESCIND ORDER OF
AUGUST 17, 1992 APPOINTING A SPECIAL MASTER

Comes now George Parker, a subpoenaed witness in the proceeding before Honorable Thomas A. Wiseman, Judge of the United States District Court for the Middle District of Tennessee, Special Master, and requests this Court pursuant to Fed. R. App. P. 27 and Local Rule 8 to rescind its Order of August 17, 1992, appointing Judge Wiseman as a master.

This Court, concerned that fraud may have caused the Court to mistakenly affirm the

district court's denial of John Demjanjuk's habeas corpus petition, Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), referred the matter to a special master to conduct an investigation into the allegations of fraud. In making the referral to the special master, the Court referenced F.R.Civ.R 53. In making the referral the Court failed to set forth any exceptional circumstance warranting referral to a special master, as required by Rule 53(b). In fact, no such special circumstance exists. Instead, the Court should have referred the investigation to the United States District Court for the Northern District of Ohio where the litigation originated, where the alleged fraud first occurred, and where the district court has extensive experience and intimate knowledge of the pre-trial and trial proceedings concerning Mr. Demjanjuk.

The action by this Court in appointing a special master constitutes an abuse of its discretion in applying and utilizing its inherent powers to investigate allegations of fraud affecting its judgments. Therefore, the Court should rescind its Order of August 17, 1992 appointing a special master and reconsider its actions.

A memorandum of law is submitted herewith.

Respectfully submitted,

_____

Charles P. Goodell, Jr.

_____

Goodell, DeVries, Leech & Gray
25 S. Charles Street
Suite 1900
Baltimore, MD 21201
(410) 783-4000

Attorneys for George Parker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of October, 1992, a copy of the foregoing Motion To Rescind Order Of August 17, 1992 Appointing A Special Master and Memorandum in Support thereof, was mailed, first class, postage prepaid to Edward F. Marek, Esquire, Office of the Federal Public Defender, Skylight Office Tower, 1660 West Second Street, #750, Cleveland, OH 44113 and to the Honorable Thomas A. Wiseman, United States District Court for the Middle District of Tennessee, United States Court House, 801 Broadway, Nashville, TN 37203; Dana Biehl, Deputy Chief, Violent Crimes and Terrorism Section, Department of Justice P. O. Box 7179, Washington, D. C. 20044-7179; and to Michael E. Tigar, School of Law, University of Texas

at Austin, 727 E. 26th Street, Austin, TX 78705.

Charles P. Goodell, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN DEMJANJUK	*	
Petitioner	*	
v.	*	Case No. 85-3435
JOSEPH PETROVSKY, et al.	*	
Respondents	*	

* * * * * * * * * *

MEMORANDUM OF LAW AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO RESCIND ORDER OF AUGUST 17, 1992 APPOINTING A SPECIAL MASTER

INTRODUCTION

On August 25, 1977 the United States Government through the Department of Justice filed a complaint in the United States District Court for the Northern District of Ohio pursuant to § 1451(a) of the Immigration and Naturalization Act to revoke John Demjanjuk's certificate of naturalization. There was an extensive pre-trial discovery period. Thereafter, Demjanjuk's

naturalization was revoked. Demjanjuk v. United States, 518 F. Supp. 1362 (N.D. Ohio 1981), aff'd 680 F.2d 32 (6th Cir. 1982), cert. denied, 459 U.S. 1036 (1982).

Subsequently, there have been numerous proceedings concerning Demjanjuk, including deportation and extradition proceedings. Petitioner George Parker, who has been called as a witness by the special master, the Honorable Thomas A. Wiseman, and required to produce documents, participated in the denaturalization proceeding at the pre-trial level only, and he departed the Department of Justice before the case came to fruition.

A denaturalization suit is a civil proceeding, equitable in nature. Generally, the proceeding conforms to procedures applicable to suits in equity, including following the Federal Rules of Civil

Procedure. Fed. R. Civ. P. 81 provides for the general applicability of the Rules. More specifically, Rule 81(a)(6) provides that in proceedings to cancel certificates of citizenship under Section 1451 of Title 8, "the provisions for service by publication and for answer ... remain in effect." Thus, except for the specific statutory provisions in § 1451, denaturalization proceedings are governed by civil rules. 4 C. Wright & A. Miller § 1021 (1987) citations omitted.[1]

---

[1] The District Court for the Northern District of Ohio expressly described Demjanjuk's denaturalization proceeding as civil in nature. United States v. Demjanjuk, 518 F.Supp at 1372, citing Schneiderman v. United States, 320 U.S. 118 (1943).

Additionally, during Demjanjuk's extradition proceeding the Norther District Court of Ohio expressly stated that denaturalization proceedings are not criminal prosecutions. In re Extradition of Demjanjuk, 612 F.Supp 544, 569 (N.D. Ohio 1985). Other courts have also expressly indicated that denaturalization proceedings are not criminal. Thus, a defendant is not entitled to all the incidents provided for in criminal

George Parker denies all allegations of wrongdoing. Throughout the pretrial period he at all times abided by the Federal Rules of Civil Procedure and the requirements therein.

Petitioner George Parker, by counsel, brings this Motion before this Court to rescind the reference to a special master because his individual rights may be violated or denied, and his reputation, his livelihood and his future in his chosen profession and otherwise irrevocably and permanently harmed by the pending investigation initiated by this Court.[2] Any finding of prosecutorial

---

proceedings. See United States v. Kairys, 782 F.2d 1374, 1382-83 (7th Cir.), cert. denied, 476 U.S. 1153 (1986); United States v. Shellong, 717 F.2d 329, 336 (7th Cir.), cert. denied, 465 U.S. 1007 (1984).

[2] This Court, in its Order of August 17, 1992 stated that "this court's inquiry concerns whether lawyers from the Department of Justice engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the

misconduct will affect Petitioner personally. Your Petitioner's interest in this proceeding could not be more direct and profound. Petitioner must timely object to the appointment of the special master or face a claim this right has been waived. Burlington Northern RR. Co. v. Dept. of Revenue, 934 F.2d 1064, 1069 (9th Cir. 1991) rv'd on other grounds, 952 F.2d 406 (9th Cir. 1991), cert. denied, Collins v. Burlington Northern RR. Co., WL 14551 (Oct. 5, 1992); United States v. Conservation Chemical Company, 106 F.R.D. 210 (W.D.Mo. 1985); Martin Oil Service, Inc. v. Koch Refining Co., 718 F. Supp. 1334, 1338 (N.D. Ill., E.D. 1989).

---

notorious Ukrainian guard known as 'Ivan the Terrible' who operated the gas chambers at the Treblinka, Poland Nazi death camp." Order, P. 1.

I. APPOINTMENT OF A SPECIAL MASTER PURSUANT TO F.R. CIV. P. 53 IS AN INAPPROPRIATE USE OF THE INHERENT POWER OF THIS COURT.

This Court in its Order of August 17, 1992, stated that it was acting pursuant to its inherent power to grant relief for "after discovered fraud" when it appointed a special master pursuant to Fed. R. Civ. P. 53. By use of Fed. R. Civ. P. 53 by this Court in this instant matter as a procedural vehicle to investigate the issue of fraud, the Court must accept the Rule in its entirety. However, the Court has not followed the literal requirements set forth by the Rule in its appointment of a special master and this is an abuse of discretion by the Court.

Rule 53 reads in pertinent part:

> [b] Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the

> issues are complicated; in actions to be tried without a jury, save in matters of accounting or difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a Special Master without regard to the provisions of this sub-division.

The reference to a special master in this matter does not contemplate a jury; all determinations will be by the special master, Judge Wiseman. In these circumstances Rule 53 requires that reference to a special master "shall be made only upon a showing that some exceptional condition requires it". (Emphasis Added). The Court's Order discusses the basis of its concern that a fraud may have been committed during the lower court proceedings; however, the Court fails to set forth the

"exceptional condition" which would authorize reference to a special master.

Numerous court decisions have considered the exceptional circumstance requirement of Rule 53. The underlying holding in these cases severely circumscribes the court's discretion in appointing a special master. Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). It is clear that liberality is not intended to be afforded in any auxiliary references to a master in non-jury cases. Arthur Murray, Inc. v. Oliver, 364 F.2d 28, 32 (8th Cir. 1966), vacated on other grounds, 406 F.2d 1138 (8th Cir. 1969). Factual matters turning on credibility are not an exceptional circumstance warranting delegation to a master. Bennerson v. Joseph, 583 F.2d 633,

642 (3rd Cir. 1978). The court in In re Bituminous Coal Operators Assn., 949 F.2d 1165, (D.C.Cir. 1991), indicated that special masters can be used only when exceptional conditions exist and cannot be used to remove dispositive questions of fact and law from a judge. Courts have consistently agreed that complex issues create compelling reasons to deny reference to a special master and usually require the issue to be determined by a court and judge with experience on the issue. See Burlington Northern RR. Co. v. Dept. of Revenue, 934 F.2d at 1072.

In the leading case on the use of discretion by courts in appointing special masters, La Buy v. Howes Leather Co., Inc., 352 U.S. 249 (1957), the Supreme Court reiterated that "[L]itigants are entitled to a trial by the court, in every case, save where exceptional circumstances are shown", citing

Adventures in Good Eating, Inc. v. Best Places To Eat, Inc., 131 F.2d 809, 815 (7th Cir. 1942). Assignment to a special master can deprive the parties of a trial before the court on the basic issues involved in the litigation. La Buy at 256. In La Buy the court also stated that court "congestion in itself is not such an exceptional circumstance as to warrant a reference to a master". Id. at 315. Additionally, the court went on to state that the terms "exception" and "exceptional" as used in Rule 53 are not elastic terms.

Courts of appeals have consistently applied La Buy to reverse orders of reference to special masters in a wide variety of non-jury trial proceedings, including contempt proceedings. See, e.g., In re Bituminous Coal Operators Association, Inc., supra, (D.C. 1991)(collective bargaining agreement

dispute); Burlington Northern Railroad Co. v. Dept. of Revenue, supra, (temporary injunction proceeding); Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089, 1097 (3d Cir. 1987)(contempt proceeding); In re United States, 816 F.2d 1083, 1091 (6th Cir. 1987)(superfund cleanup case); Bennerson v. Joseph, supra, (3rd Cir. 1978)(action challenging conveyance); Piper v. Hauck, 532 F.2d 1016, 1019 (5th Cir. 1976)(prisoner's civil rights complaint).

Issues of fraud particularly are not proper subjects for reference to a special master. As stated by the Seventh Circuit as early as 1938 in In re Irving-Austin Bldg. Corp., 100 F.2d 574, 577 (7th Cir. 1938):

> "A fraud issue, ordinarily, is not a proper one for reference to a special master. Perhaps it would be better to say, -- issues in fraud hearings are not the proper subject for

> reference to a special master, save in extraordinary or exceptional cases. And exceptional means the rare -- the unusual case or circumstances. The rule is more than an academic pronouncement. It demands application."

The Sixth Circuit followed the above reasoning in Bradshaw v. Thompson, 454 F.2d 75, 80 (6th Cir. 1972), cert. denied, 409 U.S. 878 (1972), and determined that fraud is not an appropriate issue for reference to a special master:

> "The overall mandate of Rule 53(b) is that reference to a master is to be the exception and not the rule. Actions for fraud are particularly inappropriate for reference to a master, 'save in extraordinary or exceptional cases'."

The Sixth Circuit more recently, in In re United States, 816 F.2d 1083 (6th Cir. 1987), reaffirmed its position that

utilization of special masters in non-jury cases to hear and report on the main issues in litigation has little support. Id. at 1087. The court dealt with the issue of whether reference to a special master was an abuse of discretion. The District Court for the Northern District of Ohio appointed a Special Master to review and submit recommendations on dispositive motions in an action instituted by the government under the Comprehensive Environmental Response Compensation Liability Act. The Sixth Circuit rejected the district court's assertion that (1) calendar congestion, (2) complexity of the issues, (3) possibility of a lengthy trial, (4) the extraordinary pre-trial management required in a case with more than 250 parties, and (5) the public interest and the quickest feasible resolution of the super fund cases constituted exceptional circumstances so as to allow

appointment of a master. The appointment was therefore an abuse of discretion. Id. at 1088.

The following language from the court's opinion is particularly instructive of the limitation on the discretion of courts in appointing special masters:

> "Commentators have observed that La Buy severely restricts the circumstances in which a reference will be proper in a nonjury case:
>
> Though the La Buy Court was silent about what does constitute an exceptional condition, its rejection of the three most obvious matters claimed to constitute such a condition justifies the observation of Judge Kaufman that the utilization of special masters to hear and report on the main issues in litigation under Rule 53 has little support in the non-jury area. With a few minor exceptions, references in non-jury

cases run counter to the spirit and purpose of judicial administration in the federal courts.

Even before the La Buy case courts frequently held that there was no exceptional condition justifying a reference, and they have done so much more consistently since that decision. A reference is still proper on matters of account and of damages.

The use of a special master to supervise discovery may still be appropriate and useful in unusual cases.

Beyond the situations just described it is difficult to conceive of a reference of a nonjury case that will meet the rigid standard of the La Buy decision. This restrictive policy is necessary because reference of a nonjury case not only involves expense and delay but, since the master's findings must be accepted unless they are clearly erroneous, it also involves the danger that

> the master, not the court, will in fact decide the case."
>
> 9 C. Wright and A. Miller, Federal Practice and Procedure § 2504 (1971), at 789-91 (footnotes omitted) (quoting Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L. Rev. 452, 459 (1958)). See also, Ingram v. Richardson, 471 F.2d 1268, 1271 (6th Cir. 1972)(quoting Wright and Miller with approval in holding that reference to magistrate under Rule 53(b) was improper." (Footnote omitted).

See also, United States v. Hooker Chemical & Plastics Corp., 123 F.R.D. 62, 63 (W.D.N.Y. 1988)(Reference to a special master is especially discouraged where the matters sought to be referred may be dispositive of basic issues involved in the litigation.); Polish National Alliance of the United States of North America v. N.L.R.B., 159 F.2d 38 (7th

Cir. 1946)(Rule 53 by analogy applies to Circuit Court of Appeals.)

Since there are no exceptional circumstances in this matter, it is an abuse of discretion to appoint a special master to determine the sole issue in this case -- whether fraud was practiced before this Court.

II. THE COURT SHOULD HAVE REMANDED THIS MATTER TO THE DISTRICT COURT

The proceedings involving Demjanjuk have been ongoing for over a decade, primarily in the United States District Court for the Northern District of Ohio ("district court"). As a forum for numerous proceedings, the district court is clearly the better suited forum for reviewing the multitude of facts and evidence that will be presented during an investigation into the issue of fraud. By referring this matter to a special master the court has ignored the district court where the alleged fraud allegedly occurred and has

delegated to the special master responsibility to determine the basic issues involved in this proceeding.

Allegations similar to the ones now before the special master have previously been examined in the district court. First, following the denaturalization trial, but before the court rendered its decision, Demjanjuk made a motion for a new trial arguing that the government's failure to comply with pre-trial discovery prevented him from obtaining information necessary to the defense. United States v. Demjanjuk, 518 F. Supp. 1362, 1384 (N.D. Ohio 1981), aff'd 680 F.2d 32 (6th Cir. 1982), cert. denied, 459 U.S. 1036 (1982). Demjanjuk's allegations were based on the government's failure to provide five statements from Soviet witnesses who were present at the Trawniki training camp in 1942. The government received the

statements shortly before trial, and the witnesses were interviewed by the Soviet government, not the Department of Justice. Demjanjuk contended that the government had a duty to provide the names of the Soviet witnesses by supplementing interrogatories according to Fed. R. Civ. P. 26(e)(1)(A), and failure to do so was cause for a new trial.

The district court held that the government breached its duty with respect to Dorofeev's statement, but not with respect to the remaining four Soviet witnesses. Id. at 1384-85. Having just heard all of the denaturalization testimony, the court determined that the four Soviet statements would be cumulative and as such would not have produced a different result in the denaturalization trial. Id. at 1386.

Second, subsequent to the motion for a new trial, Demjanjuk proceeded to bring a

motion to vacate the decision to revoke his certificate of naturalization. See, United States v. Demjanjuk, 103 F.R.D. 1 (N.D. Ohio 1983). Because the motion was made more than one year after the denaturalization proceeding, the court ruled that the allegation of fraud upon the court pursuant to Fed. R. Cir. P. 60(b)(6) was the only method by which the prior judgment would be vacated.

Demjanjuk's allegations of fraud were based on affidavits submitted by German Guard Otto Horn, Trawniki camp paymaster Heinrich Schaefer, and Demjanjuk's counsel O'Connor. The alleged fraud included submission by the government of perjured statements by Horn and Schaefer at trial, and allegations that the government Office of Special Investigation (OSI) collaborated with the Soviet government to conceal the perjury. Id. at 8. In proceeding with the motion,

familiarity with all of the evidence previously presented at the denaturalization trial bestowed the knowledge necessary for the district court to conclude that the new information did not differ materially from testimony already considered by the court. Id. at 5. Hence, in the absence of new substantiated evidence, the court refused to vacate the judgement.

It is altogether fitting that the court before which the alleged fraud occurred, not a special master unfamiliar with the underlying litigation, be designated the appropriate forum to investigate the issue of fraud. "[T]he proper forum in which to assert that a party has perpetrated a 'fraud on the court' is the court which allegedly was a victim of that fraud." Weisman v. Charles E. Smith Management, Inc., 829 F.2d 511, 513 (4th Cir. 1987), citing Universal Oil Co. v. Root

Refining Co., 328 U.S. 575, 580-81 (1946). If fraud was practiced, it was in the proceedings before the district court; nothing additional happened before the Sixth Circuit. The district court not only has familiarity with prior claims of fraud but in fact has gained extensive experience in its role as primary fact-finder with respect to the multiple issues which arose with respect to the denaturalization and extradition proceedings. For these reasons, the district court constitutes the preferable forum for investigating whether the government committed a fraud on the court.[3]

In March of 1984 in In re Extradition of Demjanjuk, 584 F. Supp. 1321

---

[3] "Indeed, the trial court 'is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)'." Standard Oil Co. of California v. United States, 429 U.S., 17, 19 (1976) citing Wilkin v. Sunbeam Corp., 405 F.2d 165, 166 (10th Cir. 1968).

(N.D. Ohio 1984), recusal proceedings against Judge Battisti were initiated in the district court. A decision on the motion for recusal required an in-depth analysis of the affidavits submitted in support of the motion, as well as an in-depth analysis of any potential bias or prejudice on the part of the judge. In concluding that there was no need for a recusal, the court pointed out the importance of having someone familiar with the history of a pending matter continue to preside over the case. Id. at 1331. Therefore, in the absence of any evidence that the judge was biased, the court indicated it was necessary not to "waste judicial resources that have already been invested in the proceeding,... [especially] in instances where... as here a single judge has acquired by experience, familiarity with a protracted involved case which could not easily be passed

to a second judge. (citation omitted.)" Id. at 1332. citing City of Cleveland v. Cleveland Electric Illuminating Co., 503 F. Supp. 368, 370 (N.D. Ohio 1980). Similar to the recusal decision, the Sixth Circuit should not waste judicial resources until it substantiates with credible evidence reasons why the district court is not the appropriate forum for the investigation of the alleged fraud.

Further, the array of related issues entertained in the district court included hearings to clarify what issues were proper for presentation during the extradition hearing. In re Extradition of Demjanjuk, 603 F.Supp. 1468 (N.D. Ohio 1984). Additionally, the jurisdiction of the district court to hold extradition hearings was challenged with the contention that only a military tribunal would have jurisdiction. In re Extradition of Demjanjuk, 603 F.Supp. 1468 (N.D. Ohio 1985).

After a review and analysis of 18 U.S.C. §3184 and the 1963 Extradition Treaty between the United States and Israel, the district court found that it did have jurisdiction to entertain the extradition proceeding. Id. at 1469- 1472.

Finally, after deciding in favor of extradition, the district court denied habeas corpus relief to Demjanjuk. Demjanjuk v. Petrovsky, 612 F.Supp. 571 (N.D. Ohio 1985) cert. denied 475 U.S. 1016 (1986). The Sixth Circuit's decision on appeal to confirm the denial is the motivation for the proposed investigation of fraud. See Order of August 17, 1992.

Any investigation of alleged fraud before the district court will require a thorough examination and understanding of the extensive record in the numerous proceedings before the district court. Given the years

and experience invested with the district court in the past proceedings, this instant matter should be remanded to the district court with instructions. The investigation should be in the hands of the affected district court where adversary proceedings with full regard for due process will be assured.[4] The time and expense it will take to educate a fact finder in another forum, the Middle District of Tennessee, is not justified absent specific exceptional circumstances.

---

[4] Special Master Judge Wiseman at the September 4, 1992 hearing indicated that he would receive marked evidence, and question the witnesses, but did not anticipate cross-examination by Petitioner's counsel. The law is clear that "the usual safeguards of adversary proceedings must be observed". Universal Oil Products Co. v. Root, 328 U.S. 575 (1946); see also, Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985) cert. denied, 474 U.S. 1086 (1986). Judge Wiseman also has indicated that Demjanjuk's attorneys may be permitted special privileges in determining the course of the investigation by the special master. These preliminary statements by the special master do not have the indicia of an adversary proceeding.

Even if the time and expense is warranted, given the extensiveness of the prior proceedings and the complexity and extensiveness of the anticipated proceeding it is unlikely that the wealth of knowledge already contained in the district court can be re-created with the appointment of a special master.

In Hazel-Atlas the Supreme Court left open the question of whether hearings related to allegations of fraud on the court might be better conducted by a district court. Hazel-Atlas, Id. at 1003 n. 5; 16 Wright and Miller §3938 (1977 & Supp. 1992). In the instant case where the fraud is alleged to have occurred in the district court denaturalization and extradition proceedings the inherent power to investigate is better suited to the district court.

CONCLUSION

This Court's Order of August 17, 1992 appointing a special master to determine if fraud on the Court has been perpetrated is an abuse of discretion. The Court has set forth no exceptional circumstance in support of its action in appointing a special master. Reference to a master in a non-jury case has little support in the cases. Issues of fraud are especially inappropriate for determination by a master. A master should not be utilized to decide the basic issue in a proceeding. The Court has set forth no special circumstance in support of its action. This matter should have been remanded to the United States District Court for the Northern District of Ohio for consideration since the alleged fraud occurred before that court. It is an abuse of discretion by the Court not to do so.

Accordingly, it is requested that the Court's Order of August 17, 1992 be rescinded for further consideration by the Court of an appropriate course of action.

Charles P. Goodell, Jr.
Goodell, DeVries, Leech & Gray
25 South Charles Street
Suite 1900
Baltimore, MD 21201
(410) 783-4000

Attorneys for Petitioner
George Parker

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,	:	CASE NO. 85-3435
	:	
Petitioner-Appellant	:	JUDGE THOMAS A. WISEMAN, JR.
	:	SPECIAL MASTER
-vs-	:	
	:	
JOSEPH PETROVSKY, et al.,	:	
	:	
Respondents-Appellees	:	

PETITIONER'S OBJECTION TO
GEORGE PARKER'S MOTION TO STAY THE SUBPOENA

George Parker, a witness subpoenaed to testify before the Special Master on November 12, 1992, has moved for a stay of enforcement of the subpoena for his personal appearance until the Sixth Circuit has ruled on his motion to rescind appointment of the Special Master. Petitioner respectfully requests that the motion for stay be denied as Mr. Parker's memorandum filed in support does not raise any sufficient grounds for the relief sought as more particularly set forth in Petitioner's

Statement In Opposition incorporated by reference herein.

Respectfully submitted,

EDWARD F. MAREK (#0032180)
Federal Public Defender
Skylight Office
1660 West 2nd Street #750
Cleveland, Ohio 44113
(216) 522-4856

MICHAEL G. DANE (#0034206)
First Assistant
Federal Public Defender
1660 West 2nd Street #750
Cleveland, Ohio 44113
(216) 522-4856

MICHAEL E. TIGAR
School of Law
University of Texas
at Austin
727 East 26th Street
Austin, TX 78705

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's Objection to George Parker's Motion to Stay the Subpoena sent via regular United States Mail, postage prepaid at Cleveland, Ohio this 29 day of October, 1992 to:

Honorable Thomas A. Wiseman, Jr.
Special Master
United States District Court
for the Middle District of Tennessee
824 U.S. Courthouse
801 Broadway
Nashville, Tennessee 37203

Patty Merkamp Stemler
Chief, Appellate Section
Criminal Division
Department of Justice
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044

Charles P. Goodell
GOODELL, DEVRIES, LEECH, GRAY
25 S. Charles Street, Suite 1900
Baltimore, MD 21201

EDWARD F. MAREK
Federal Public Defender
1660 West 2nd Street #750
Cleveland, Ohio 44113
(216) 522-4856

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,	:	
	:	
Petitioner-Appellant	:	
	:	
-vs-	:	CASE NO. 85-3435
	:	
JOSEPH PETROVSKY, et al.,	:	
	:	
Respondents-Appellees	:	

PETITIONER-APPELLANT'S STATEMENT IN OPPOSITION TO GEORGE PARKER'S MOTION TO RESCIND ORDER OF AUGUST 17, 1992

George Parker, a witness subpoenaed to appear before the Honorable Thomas A. Wiseman, Jr., Special Master, on November 12, 1992, through counsel, has filed a motion in this Court to rescind the Order of August 17, 1992, appointing a Special Master. Furthermore, Mr. Parker has relied on his Memorandum filed in this Court in support of the motion to rescind, to request a stay of his scheduled testimony before the Special Master. Petitioner-Appellant, John Demjanjuk, through

counsel, files this statement in opposition. In the event this Court requires additional briefing by the parties, Petitioner-Appellant will comply in a timely manner.

I. Standing

George Parker is not a party to this proceeding. He cites no authority giving him standing to object to this Court's reference to the Special Master. Rather, Mr. Parker is a witness who will be called to offer relevant evidence and documents.

The Government/Respondent, as represented by the Department of Justice, is the other party in this case and can be expected to contest the issue. That issue is fraud on the court through prosecutorial misconduct in withholding evidence from the District court and this Court in proceedings which led to Petitioner-Appellant's extradition. These interests are similar to those now asserted by

George Parker. Moreover, the remedy Mr. Parker seeks -- remand to the District Court for the Northern District of Ohio to investigate the issue of fraud on the court -- would not avoid the claimed harm he asserts since he would also be called as a witness in that proceeding.

II. Reference to a Special Master

George Parker does not, nor could he, challenge the authority of this Court to inquire into the issue of fraud; nor does he challenge the discretion of this Court to refer the matter to a Special Master pursuant to Rule 53, Federal Rules of Civil Procedure. Rather, Mr. Parker complains that there was not an explicit finding of exceptional circumstances warranting the reference. On the contrary, this Court's August 17, 1992 Order and the briefs and appendices filed by the parties in this proceeding pursuant to the

Court's June 5, 1992 Order amply demonstrate the exceptional nature of this case. Such circumstances need not be repeated here.

Furthermore, as stated in the August 17, 1992 Order, this Court is determined to make as complete a record as possible on the issues raised. Clearly the Court has the discretion to choose the vehicle of a Special Master to assist in making a record. Indeed, the Court could have undertaken this task itself. Dispositive questions of fact and law will still be made by this Court.

The Supreme Court has reaffirmed that the power of a Federal Court to investigate whether a judgment was obtained by fraud is beyond question. Universal Oil Co. v. Root Mfg. Co., 328 U.S. 525 (1946). Notably in Universal Oil Company, the Court of Appeals employed the services of a Special Master to conduct an investigation. As long as the

usual safeguards of an adversary proceeding are observed, as they will be before Judge Wiseman, it was not an abuse of discretion to refer this inquiry to a Special Master. Judge Wiseman has indicated that the Federal Rules of Evidence will apply in the hearings conducted in Nashville. (September 4, 1992, Tr. at p 9). The interests of the other party to this litigation will be ably represented by four attorneys from the Department of Justice who also can be expected to assure that the proceedings are adversary.

Respectfully submitted,

EDWARD F. MAREK (#0032180)
Federal Public Defender
Skylight Office
1660 West 2nd Street #750
Cleveland, Ohio 44113
(216) 522-4856

MICHAEL G. DANE (#0034206)
First Assistant
Federal Public Defender
1660 West 2nd Street #750
Cleveland, Ohio 44113
(216) 522-4856

MICHAEL E. TIGAR
School of Law
University of Texas
at Austin
727 East 26th Street
Austin, TX 78705

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner-Appellant's Statement In Opposition To George Parker's Motion to Rescind the Order of August 17, 1992 was sent via Federal Express, this 29 day of October, 1992 to:

Honorable Thomas A. Wiseman, Jr.
Special Master
United States District Court
for the Middle District of Tennessee
824 U.S. Courthouse
801 Broadway
Nashville, Tennessee 37203

Patty Merkemp Stemler
Chief, Appellate Section
Criminal Division
Department of Justice
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044

Charles P. Goodell
GOODELL, DEVRIES, LEECH, GRAY
25 S. Charles Street, Suite 1900
Baltimore, MD 21201

EDWARD F. MAREK
Federal Public Defender
1660 West 2nd Street #750
Cleveland, Ohio 44113
(216) 522-4856

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

JOHN DEMJANJUK	*	
Petitioner	*	
v.	*	Case No. 85-3435
JOSEPH PETROVSKY, et al.	*	
Respondents	*	

* * * * * * * * * *

MOTION TO STAY SUBPOENA AD TESTIFICANDUM

George Parker, by his attorneys, Charles P. Goodell, Jr., and Goodell, DeVries, Leech & Gray, moves pursuant to Federal Rule of Civil Procedure 45 for an order to stay enforcement of the subpoena for his personal appearance before the Special Master on November 12, 1992. The following is stated in support of the Motion:

1. George Parker, Petitioner, has been issued a subpoena pursuant to the Sixth Circuit Court of Appeals August 17, 1992

Order, whereby the Honorable Thomas A. Wiseman, Judge of the United States District Court for the Middle District of Tennessee, was appointed Special Master to conduct an investigation to determine if a fraud had been perpetrated on the Court.

2. Currently, Petitioner, by counsel, has filed a Motion to rescind the Order of August 17, 1992 appointing a special master.[1] If the Motion to the Sixth Circuit is granted, the Special Master will be without jurisdiction to entertain hearings in this matter, thereby rendering the instant subpoena invalid.

3. Petitioner's individual rights may be violated or denied, and his reputation, his livelihood, and his future in his chosen profession and otherwise irrevocably and

---

[1] A copy of the Motion is attached as Exhibit 1.

permanently harmed by complying with the subpoena to appear before a special master, whose assignment pursuant to Federal Rule of Civil Procedure 53(b), constitutes an abuse of discretion by the Sixth Circuit.

4. The motion to stay is timely. George Parker's appearance is not requested until November 12, 1992.

WHEREFORE, George Parker, through his attorneys, respectfully requests this Court stay the enforcement of the subpoena until the Sixth Circuit has ruled on the Motion to Rescind Appointment of a Special Master.

Charles P. Goodell, Jr.

Goodell, DeVries, Leech
& Gray
25 S. Charles Street
Suite 1900
Baltimore, MD 21201
(410) 783-4000

10/30/92 at 1:30 P.M.

Denied. Application for stay on this basis should be addressed to the panel!

Thomas A. Wiseman, Jr.

No. 85-3435

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK, Petitioner-Appellant, v. JOSEPH PETROVSKY, et al., Respondents-Appellees.	)	ORDER

Before: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

The Court has before it the motion of a witness, George Parker, requesting this Court to rescind its previous order of August 17, 1992, appointing a Special Master.

The Court for the reasons previously stated regards this case as exceptional and therefore declines to rescind its earlier order.

Accordingly, the motion to rescind is DENIED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

FILED

NOV 04 1992

LEONARD GREEN, Clerk

BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,	*	
Petitioner-Appellant,	*	Case No. 85-3435
v.	*	
JOSEPH PETROVSKY, et al.,	*	
Respondents-Appellees.	*	

* *

SUGGESTION FOR REHEARING EN BANC

George Parker, a non-party witness, pursuant to F.R. App. P. 35 (b) and Sixth Circuit Local Rule 14(a), petitions this Court for a hearing en banc of George Parker's Motion To Rescind Order of August 17, 1992 Appointing a Special Master.

INTRODUCTION

A panel of this Court, composed of Judges Merritt, Keith, and Lively, has undertaken the extraordinary action of commencing an investigation of alleged

"prosecutorial misconduct" in a habeas proceeding, Demjanjuk v. Petrovsky, 612 F.Supp. 544 (N.D. Ohio 1985), aff'd 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986). This investigation was undertaken sua sponte by the Court based upon newspaper accounts. The referenced habeas proceeding is the latest court decision which followed several court decisions involving Demjanjuk initiated in the District Court for the Northern District of Ohio. See, e.g., Demjanjuk v. United States, 518 F.Supp. 1362 (N.D. Ohio, 1981), aff'd. 680 F.2d 32 (6th Cir. 1982), cert. denied, 459 U.S. 1036 (1982); United States v. Demjanjuk, 103 F.R.D. 1 (N.D. Ohio 1983); In the Matter of the Extradition of John Demjanjuk, 584 F.Supp. 1321 (N.D. Ohio 1984); In re Extradition of Demjanjuk, 603 F. Supp. 1468 (N.D. Ohio 1985);

In re Extradition of Demjanjuk, 612 F.Supp. 544 (N.D. Ohio 1985).

Pursuant to the investigation commenced by the panel, the panel referred the matter to a special master, Honorable Thomas A. Wiseman, Judge of the United States District Court for the Middle District of Tennessee under the provisions of F.R.Civ. P. 53. The panel authorized the issuance of subpoenas to non-party witnesses, including George Parker, who is now scheduled to testify and produce documents in the investigation. George Parker, who participated in the earliest pretrial proceeding involving Mr. Demjanjuk, can be personally affected by any conclusion of "prosecutorial misconduct."

F. R. Civ. P. Rule 53(b) provides that in actions to be tried without a jury a reference to a master shall be made only upon a showing that some exceptional condition

requires it.[1] George Parker filed a Motion To Rescind Order Of August 17, 1992 Appointing A Special Master because no exceptional condition was set forth in the Order and there is no exceptional condition which requires reference of this matter to a master. It was also suggested that if an investigation is to be undertaken the matter be referred to the District Court for the Norther District of Ohio where the alleged "prosecutorial

---

[1] Rule 53 reads in pertinent part:

> [b] Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of accounting or difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a Special Master without regard to the provisions of this sub-division.

misconduct" occurred and where the district court has extensive knowledge of the prior proceedings involving Mr. Demjanjuk.

The panel denied this motion on November 5, 1992 "for the reasons previously stated regarding this case as exceptional". Again, no exceptional condition has been set forth.

STATEMENT OF COUNSEL FOR HEARING EN BANC

A. Counsel for George Parker expresses a belief, based on a reasoned and studied professional judgment, that the issuance of the subpoenas and the conduct of this investigation by a special master is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit and the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Bradshaw v. Thompson, 454 F.2d 75 (6th Cir. 1972); cert. denied, 409 U.S. 878;

In re United States, 816 F.2d 1083 (6th Cir. 1987);

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944);

La Buy v. Howes Leather Co., Inc. et al., 352 U.S. 249 (1957);

Universal Oil Products Co. v. Root, 328 U.S. 575 (1946).

B. Counsel for George Parker also expresses a belief, based on a reasoned and studied professional judgment, that the conduct of an investigation by a special master involves one or more questions of exceptional importance:

1. Whether this Court abused its discretion in referring an investigation of alleged fraud on the Court to a special master

pursuant to F.R.Civ.P. 53 which requires a showing that some exceptional condition required it?

2. Whether this Court abused its discretion in referring an investigation of alleged fraud on the Court to a special master when the alleged fraud occurred in the first instance in proceedings before the District Court for the Northern District of Ohio in the course of pretrial proceedings?

Respectfully submitted,

Charles P. Goodell, Jr.
Goodell, DeVries, Leech
& Gray
25 South Charles Street
Suite 1900
Baltimore, MD 21201
(410) 783-4000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 1992, a copy of the

Suggestion for Rehearing En Banc was mailed, postage prepaid, to the following:

Patty Merkamp Stemler
Chief, Appellate Section
Criminal Division
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044

Edward F. Marek
Federal Public Defender
Northern District of Ohio
Skylight Office Tower - Suite 750
1660 West 2nd Street
Cleveland, OH 44113

Michael E. Tigar
School of Law
University of Texas at Austin
727 E. 26th Street
Austin, TX 78705

Honorable Thomas A. Wiseman, Jr.
United States District Court
for the Middle District of Tennessee
824 U.S. Courthouse
801 Broadway
Nashville, TN 37203

_____
Charles P. Goodell, Jr.

BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,	*	
Petitioner,	*	
v.	*	Case No. 85-3435
JOSEPH PETROVSKY, et al.,	*	
Respondents.	*	

* *

MOTION TO STAY SUBPOENA AD TESTIFICANDUM
OR TO POSTPONE HEARING NOVEMBER 12, 1992

George Parker, by his attorneys, Charles P. Goodell, Jr., and Goodell, DeVries, Leech & Gray, moves pursuant to Federal Rule of Civil Procedure 45 for an order to stay enforcement of the subpoena for his personal appearance before the Special Master on November 12, 1992. The following is stated in support of the Motion:

1. George Parker, Petitioner, has been issued a subpoena pursuant to the Sixth Circuit Court of Appeals August 17, 1992

Order, whereby the Honorable Thomas A. Wiseman, Judge of the United States District Court for the Middle District of Tennessee, was appointed Special Master to conduct an investigation to determine if a fraud had been perpetrated on the Court.

2. Currently, Petitioner, by counsel, has filed a Suggestion for Rehearing En Banc Hearing with the Sixth Circuit requesting review of the denial of Petitioner's Motion to Rescind the Order of August 17, 1992 Appointing a Special Master.[1] If the Sixth Circuit Panel, or the Court en banc, grants the motion, the Special Master will be without jurisdiction to entertain hearings in this matter. Consequently, the instant Subpoena would become invalid.

---

[1]A copy of the motions are attached as Exhibits 1 and 2.

3. Petitioner has voluntarily agreed to appear in Nashville before the Special Master even though the Special Master lacks jurisdiction to issue a subpoena for his appearance. Moreover, Petitioner is still willing to voluntarily appear in Nashville; he simply requests a stay or postponement of the hearing until the procedural motions have been ruled upon by the Sixth Circuit Court of Appeals.[2] Petitioner's right to contest the appointment of a Special Master includes the right to petition the Supreme Court of the

---

[2]Other witnesses, such as Norman Moscowitz, also have filed objections to the Appointment of a Special Master, as well as a Suggestion for an En Banc Hearing. Specifically, Petitioner Moscowitz's Motion contains additional objections to those of Petitioner Parker and a favorable ruling on any of the grounds set forth by Petitioner Moscowitz will be dispositive for all of the named witnesses. Thus, it is beneficial to the rights of all of the witnesses to postpone the hearing on November 12 until the Sixth Circuit reviews and rules on the motions before it.

United States for a writ of mandamus if the Sixth Circuit denies the Suggestion For Rehearing En Banc and the Motion to Rescind Order of August 17, 1992 Appointing a Special Master. Therefore, if Petitioner voluntarily appears before the Special Master on November 12, prior to a ruling on his Suggestion For Rehearing En Banc, he risks either waiving his right to continue to object, or rendering the issue moot before the Sixth Circuit and/or Supreme Court.

4. Issuing a stay for enforcement of the subpoena and postponing the hearing will neither adversely affect nor prejudice the parties and witnesses involved. The hearing on November 12 is limited to only two of the nine Department of Justice attorneys named regarding the August 17 Order. Future hearing dates for the other potential witnesses have not yet begun to be calendared.

The October 21, 1992 hearing before the Honorable Thomas A. Wiseman, Jr. reveals the potential need for time to schedule depositions for some of the named witnesses in an effort to avoid taking up the Court's time with unfocused and lengthy examinations during the hearing.

Given the extended time period evolving from the need to schedule potential depositions and future hearing dates, postponement of Petitioner's hearing on November 12 will not contribute to adverse delay.[3] It is not anticipated that the hearing on November 12 will resolve the issue before the Special Master or alter the need to examine the remaining Department of Justice attorneys.

---

[3]Clearly, given the number of witnesses who need to appear before the Special Master, the hearings will continue well into January of 1993.

5. Petitioner has standing to object to the appointment of the Special Master. Federal standing requires an allegation of a present or immediate injury in fact, where the party requesting standing has alleged a personal stake in the outcome of the controversy. Additionally, there must be some causal connection between the asserted injury and the challenged action, and the injury must be addressed by a favorable decision. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). In the instant matter Petitioner has been subpoenaed to give testimony in an inquiry designed to determine whether lawyers from the Department of Justice engaged in "prosecutorial misconduct" before the United States District Court for the Northern District of Ohio and before the Court of Appeals for the Sixth Circuit. A report issued by the Special Master implicating

Petitioner in a scheme to commit fraud on the Court through "prosecutorial misconduct" will violate Petitioner's individual rights, his reputation, and injure or even deprive him of his livelihood in his chosen profession. The requirement of present or immediate harm is fulfilled.

Rectifying the Order appointing the Special Master will redress the harm to Petitioner. Remanding the case for decision before the United States District Court for the Northern District of Ohio enables Petitioner to have the ultimate issue of this proceeding decided by the district court uniquely qualified by experience and expertise with the underlying proceedings to assure Petitioner's due process rights will be protected and that the investigation will be adversarial with full consideration of the prior proceedings where the alleged

"prosecutorial misconduct" took place. Any argument that Petitioner does not have standing lacks merit. The fact that Petitioner has been subpoenaed demonstrates his intimate involvement in the instant case before the Special Master.

6. Further, Petitioner's Motion to Stay or to Postpone the Hearing of November 12, 1992 is timely. Petitioner must challenge the Court's appointment of a Special Master at this time or risk the possibility of having waived that right. Current U.S. district court and court of appeals decisions, including decisions from the Sixth Circuit, instruct that the appointment of a Special Master is an exception and not the rule, and that a reference can only be made when there is a showing that some exceptional condition exists. Fed. R. Civ. P. 53(b). Neither the August 17 Order appointing the Special Master,

nor the Court of Appeals for the Sixth Circuit Court's Order denying Petitioner's motion to rescind the appointment of a Special Master express what exceptional condition is being relied upon for the reference to a Special Master. It is clear from precedents that mere fraud alone is not sufficient. Therefore, Petitioner must, at this time, object to the appointment the Special Master as an abuse of discretion or forever waive any future right to object. Granting a stay of the subpoena and/or postponing the required appearance of Petitioner, is necessary to fully protect and preserve Petitioner's procedural right to object to the reference.

WHEREFORE, given the fact that granting a stay will not adversely affect the parties, other witnesses, or the Court and the fact that the stay and/or postponement will protect Petitioner's fundamental right to

object to the August 17 Order appointing a Special Master, Petitioner respectfully requests his Motion to Stay Subpoena Ad Testificandum or to Postpone the Hearing of November 12, 1992 be granted until the Sixth Circuit Court of Appeals rules on the Suggestion For Rehearing En Banc.

Charles P. Goodell, Jr.

Goodell, DeVries, Leech
& Gray
25 S. Charles Street
Suite 1900
Baltimore, MD 21201
(410) 783-4000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of November, 1992, a copy of the Motion to Stay Subpoena Ad Testificandum and was mailed, postage prepaid, to the following:

Patty Merkamp Stemler
Chief, Appellate Section
Criminal Division
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044

Edward F. Marek
Federal Public Defender
Northern District of Ohio
Skylight Office Tower - Suite 750
1660 West 2nd Street
Cleveland, OH 44113

Michael E. Tigar
School of Law
University of Texas at Austin
727 E. 26th Street
Austin, TX 78705

Honorable Thomas A. Wiseman, Jr.
United States District Court
for the Middle District of Tennessee
824 U.S. Courthouse
801 Broadway
Nashville, TN 37203

_____
Charles P. Goodell, Jr.

BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,	*	
Petitioner,	*	
v.	*	Case No. 85-3435
JOSEPH PETROVSKY, et al.	*	
Respondents.	*	

****

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY THE SUBPOENA AD TESTIFICANDUM OR TO POSTPONE THE HEARING OF NOVEMBER 12, 1992

George Parker, by his attorneys, Charles P. Goodell, Jr. and Goodell, DeVries, Leech & Gray, in support of his Motion to Stay Subpoena Ad Testificandum or to Postpone the Hearing of November 12, 1992, relies on Federal Rule of Civil Procedure 45, and by reference incorporates the attached Suggestion for Rehearing En Banc and Motion to Rescind the Order of August 17, 1992 Appointing a Special Master. (See Exhibit 1 and 2).

Charles P. Goodell, Jr.

Goodell, DeVries, Leech
& Gray
25 S. Charles Street
Suite 1900
Baltimore, Maryland 21201
(410) 783-4000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of November, 1992, a copy of the foregoing Memorandum of Law in Support of Motion to Stay the Subpoena Ad Testificandum or to Postpone the Hearing of November 12, 1992 was mailed to:

Patty Merkamp Stemler
Chief, Appellate Section
Criminal Division
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044

Edward F. Marek
Federal Public Defender
Northern District of Ohio
Skylight Office Tower - Suite 750
1660 West 2nd Street
Cleveland, Ohio 44113

Michael E. Tigar
School of Law
University of Texas at Austin
727 E. 26th Street
Austin, Texas 78705

Honorable Thomas A. Wiseman, Jr.
United States District Court
for the Middle District of Tennessee
824 U.S. Courthouse
801 Broadway
Nashville, Tennessee 37203

Charles P. Goodell, Jr.

No. 85-3435

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK, Petitioner	)	
v.	)	O R D E R
JOSEPH PETROVSKY, et al., Respondents	)	

Before: MERRITT, Chief Judge

George Parker filed on November 10, 1992, a motion to stay enforcement of a subpoena before the Special Master or, in the alternative, to postpone the hearing of November 12, 1992. Pursuant to Rule 27(c), Fed. R. App. P., the motion is DENIED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

FILED
NOV 10 1992
LEONARD GREEN, Clerk

CASE NO. 85-3435

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,

Petitioner-Appellant,

-vs-

JOSEPH PETROVSKY, et al.,

Respondents-Appellees

PETITIONER'S RESPONSE TO SUGGESTIONS FOR HEARING AND REHEARING EN BANC BY MR. NORMAN A. MOSCOWITZ AND MR. GEORGE PARKER

The undersigned counsel for Petitioner files this Response to Petitions for Hearing and Rehearing En Banc filed by two witnesses subpoenaed to testify before the Honorable Thomas A. Wiseman, Jr. sitting as a Special Master. Both counsel for George Parker and Norman A. Moscowitz filed their Suggestions For Rehearing and Hearing En Banc on November 6, 1992. On November 12, 1992 counsel for

Petitioner received notice from the Honorable Leonard Green, Clerk of this Court, of an invitation to respond to the two Suggestions for En Banc consideration. (November 10, 1992 letter from Mr. Green attached as Apepndix A) The attorneys for Petitioner were engaged in hearings before Judge Wiseman in Nashville on November 12 and 13, 1992 and submit this Response in the short time available before the filing deadline of November 16, 1992.

I. Jurisdiction

This Court has authority to inquire into the issue of fraud on the court under controlling Supreme Court decisions. Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1991); Universal Oili Prod. Co. v. Root Ref. Co., 328 U.S. 575 (1946); Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944). The inquiry of necessity involves both the denaturalization and extradition cases since

Petitioner has alleged that events occurring during and after the denaturalization case had an influence on the extradition proceeding.[1] Petitioner has offered the Department of Justice's own definition of fraud on the court as set out in pleadings filed in 1988 in the United States District Court for the Northern District of Ohio. It includes the knowing non-disclosure of exculpatory evidence and misrepresentations which Petitioner alleges here related to the state of knowledge of evidence by government attorneys, particularly as to evidence from the former Soviet Union.[2]

---

[1] As Petitioner has pointed out in his second brief, he had a right to present evidence in the extradition proceeding which would negate a showing of probable cause. (See Petitioner's Second Brief at p. 35, n. 40 for cases cited.)

[2] Petitioner has argued six elements of fraud on the court. See, Petitioner's Second Brief, pp. 5-6. Conduct that occurred during and after the denaturalization proceeding as late as November, 1982 affected Petitioner in the extradition proceeding. It

Petitioner has argued that certain government attorneys were aware they had exculpatory evidence (i.e., the 1945 Leleko excerpt, the Polish and Soviet guard lists and the Malagon and Danil'chenko statements) and that the non-disclosure of such exculpatory evidence occurred notwithstanding numerous discovery requests made during and after the denaturalization proceeding as late as November, 1982 just prior to the denial of Certiorari by the Supreme Court. The non-disclosure of evidence and misrepresentations as to the extent of the

---

influenced his ability to defend or present his claim. This is an element of fraud on the court under one definition. Toscano v. Comm., 441 F.2d 930 (9th Cir. 1971). Over and above this, however, as Petitioner has argued the government conduct during and after the denaturalization case created an affirmative obligation of disclosure in the extradition proceeding. Petitioner asserts that an obligation of disclosure also arose by virtue of a heightened obligation on government attorneys in denaturalization and extradition proceedings.

government's knowledge of certain information were particularly significant in this case in light of the fact that the source of the evidence (the former U.S.S.R.) was closed to Petitioner. Therefore, both the district court and Petitioner looked to the Department of Justice for assistance.[3]

The government represented that it would furnish such assistance. This was recently demonstrated in testimony during hearings before Judge Wiseman in Nashville on November 12 and 13, 1992 at which Mr. Parker and Martin Mendelsohn testified. The normal adversary process was not functioning in this case as to Soviet evidence; this factor is a relevant

---

[3] In the denaturalization opinion, Judge Frank Battisti observed that: "[t]he Court is not insensitive to the additional consideration in the instant case that the defendant was necessarily dependent on United States governmental agencies for assistance in obtaining relevant information from Soviet authorities." United States v. Demjamjuk, 518 F.Supp. 1362, 1385 (N.D. Ohio 1981).

consideration in a fraud on the court case. See Kupferman v. Consolidated Research and Mfg. Corp., 459 F.2d 1072 (2nd Cir. 1972).

When presented with these arguments a panel of this Court decided to retain jurisdiction and inquire further with the aide of a Special Master pursuant to Rule 53, Federal Rules of Civil Procedure. Controlling Supreme Court cases cited above clearly permit an appellate court to conduct its own inquiry and do not require a remand to a district court. This is the path the panel chose. On Petitioner's appeal to this Court from the denial of habeas corpus from the extradition order the government relied on both survivor and expert testimony given in the denaturalization and extradition proceedings to support the district court's finding of probable cause that Petitioner committed murders as Ivan the Terrible of Treblinda.

Thus, the record as developed below was relied on before the extradition/habeas corpus panel and that panel has decided to inquire whether its decision denying habeas corpus relief was "erroneous." See June 5, 1992 Order.

In the event fraud on the court is found under controlling Supreme Court opinions, this Court may vacate its denial of a writ of habeas corpus which, in effect, would render Petitioner's extradition to Israel invalid under United States law and treaties. See 18 U.S.C. §3184. Under the Rule of Specialty, the United States as the asylum country retained an interest in Petitioner after his extradition. This Court can issue an order to an appropriate United States official over whom it has jurisdiction to demand Petitioner's return under the extradition treaty. Petitioner has already demonstrated that such a remedy is available to this Court.

(See Petitioner's Second Brief at pp. 52, 53 n.49)

Moreover, as Petitioner has demonstrated in his Second Brief (pp. 45-48), his release from United States custody does not deprive a habeas corpus court from relieving him of any collateral consequences of an invalid extradition i.e., one without proper judicial approval. See 18 U.S.C. §3184. Petitioner's present custody and prosecution in Israel would be collateral consequences of the unlawful extradition. See Umanzor v. Lambert, 782 F.2d 1299 (th Cir. 1986). The absence of a habeas corpus petitioner from the jurisdiction of the court does not defeat habeas corpus relief. (See Braden v. 30th Judicial Circuit Court of Ky, 410 U.S. 484 (1973) and cases discussed therein.)

Thus, this Court has jurisdiction to grant meaningful relief and as Petitioner has

argued (Petitioner's Second Brief at p. 41) a panel of this Court has the power to act in these cases to recall the mandates unless and until an En Banc Court says otherwise.

II. Factual Background

Petitioner presents the following facts to demonstrate that the panel's action was correct and that this inquiry should continue. However, in the limited time available for this Response, Petitioner does not seek to set forth a full factual record bearing on the issues raised by the panel's August, 1992 Orders or the En Banc Suggestions.

A. Pre-June 5, 1992

In 1991 documents were released from the former Soviet Union which convincingly demonstrate that a man named Ivan Marchenko was the Ivan the Terrible of Treblinka and not John Demjanjuk who had been extradited for being that person who committed atrocities at

Treblinka. This is the only offense for which Petitioner was extradited to Israel and for which he stood trial and was sentenced to death. Thus, evidence of alleged service at other death camps, as cited by Mr. Moscowitz, is irrelevant to the issues here.

The 1991 Soviet protocols naming Ivan Marchenko were presnted to the panel and are contained in Petitioner's three volume Appendix filed on July 16, 1992. Much of this information was widely reported in the United States media in 1991 and 1992.

This information, as well as the failure of the Department of Justice to respond to two inquiries from the Clerk of this Court on behalf of a member of the extradition panel, preceded the panel's June 5, 1992 Order which required the parties to submit additional facts which were not in the original record. Although the Order refers to Rule 60(b)(6),

Federal Rules of Civil Procedure, the authority to inquire also existed under Hazel-Atlas, supra.

B. Post-June 5, 1992

After the panel's Order reopening this case, several significant events occurred including a June 12, 1992 Department of Justice press release; the filing of briefs and appendices by the parties in July and August, 1992; the production of documents by the Department of Justice pursuant to the court's August 17, 1992 Order; and, testimony taken and exhibits offered on November 12 and 13, 1992 before Judge Wiseman in Nashville. Aspects of these events will be discussed in the order in which they occurred.

On June 12, 1992, the Department of Justice issued a press release disclosing that in August, 1978 it received materials from the former Soviet Union which included protocols

from two former Soviet Treblinka guards. One in particular, Paval Leleko, in a lengthy statement, named a "MARCHENKO and a Nickolay" as the two gas chamber motor operators of Treblinka. (Mr. Moscowitz fails to even mention the Leleko excerpt in his Motion to Quash.) The 1991 Soviet protocols contained in Petitioner's Appendix, as mentioned above, demonstrate that an Ivan Marchenko and a Nickolay Shalayev were the two gas chamber motor operators of Treblinka. One Soviet guard protcol in particular, Sergey Vasylyenko, described Ivan Marchenko as the Ivan the Terrible known to the Treblinka prisoners. (Petitioner's Appendix, Exhibit 3, pp. 58-59).

The briefs and appendices filed on July 16, 1992; July 26, 1992; and August 3, 1992, contain evidence that the Department of Justice attached significance to the name Ivan

Marchenko and that two OSI attorneys, George Parker and Norman Moscowitz, were aware of the 1945 Leleko excerpt received in 1978 from the former Soviet Union as a part of the Fedor Fedorenko protocols.[4] See, Respondent's Second Brief at p. 28 n. 11. A document produced by the Department of Justice which contains a reference to Ivan Marchenko is a January 24, 1980 memorandum from Normal Moscowitz to Alan Ryan suggesting an inquiry be made in the former USSA regarding "Ivan Marchenko or the Ivan who worked at the gas chambers." Significantly, as shown by the document itself, it was maintained in the "Demjamjuk Case File." (Petitioner's Hearing Exh. 69A).

---

[4] In an October 28, 1992 letter from Patty Merkamp Stemler, Department of Justice, to Edward F. Marek, the Department stated "to our knowledge, Messrs Parker and Moscowitz were aware of the 1978 Malagon statement and the 1945 Leleko excerpt that were received in 1978 as part of the Fedorenko protocols."

On August 11, 1992, oral arguments in this case were heard before the panel. In an August 17, 1992 Order the panel noted a concession by counsel for Respondent that "mistakes were made" regarding the disclosure of certain evidence. While counsel for Respondent later disputed the interpretation of her remarks, the panel reaffirmed its understanding and interpretation of the arguments and concessions made at oral argument. See Order of August 31, 1992. The panel also noted that counsel for Respondent conceded that it would have been "prudent" for the Office of Special Investigations (OSI) to have released the Leleko and Malagon statements obtained in the 1978 Fedorenko protpcols.

C. The November 12 and 13, 1992 Hearings

On November 12 and 13, 1992, the Special Mastger has already heard evidence which shows

that the panel's August, 1992 Orders were correct. For example, testimony by George Parker on November 12, 1992 before Judge Wiseman demonstrated that Mr. Parker concluded in 1980 that John Demjanjuk was not Ivan the Terrible. He then wrote a February 28, 1980 memorandum to that effect and gave copies to his supervisors. He also testified he later participated in a meeting with his superiors and Norman Moscowitz regarding this memorandum. While Mr. Parker testified that he gave copies of the memorandum to his superiors, to date the Department of Justice has been unable to locate any copies in its files. The copy introduced before Judge Wiseman (Petitioner's Hearing Exhibit 72) was obtained from Mr. Parker's personal file as a result of a subpoena issued by Petitioner to Mr. Parker under the authority of the panel's August 17, 1992 Order referring this matter to

a Special Master. (A copy of the Parker February 28, 1980 memorandum, the January 24, 1980 memorandum by Mr. Moscowitz, and other Hearing Exhibits referred to herein are available through the Clerk of this Court who has copies of all documents filed in the District Court in Nashville.)

In his memorandum, George Parker discussed several reasons for his conclusion in 1980 that John Demjanjuk was not Ivan the Terrible. First, he noted that:

> The Soviet Union and Poland have each investigated the crimes committed at Treblinka. Each has compiled lilsts of Ukrainian guards known to have worked at Treblinka. The two Ukrainians who incessantly worked at the gas chambers were well known (Fedorenko refers to them by first names in his statement to INS officials in February 1976). Given these circumstances it is disturbing, as Norman

> Moscowitz has pointed out repeatedly, that Demjanjuk's name does not appear on either list.

He also noted his concern over survivor photo identification evidence noting that "it's premised exclusively on the basis of photographs which may at best closely resemble the facial features of [the] man witnesses knew." He next noted a concern over Demjamjuk height in comparison to the height of Ivan the Terrible as discussed by some survivors. Finally, he noted a conflict between a statement given by a former guard, Ignot Danil'chenko, who placed John Demjanjuk at the Sobibor death camp from March, 1943 and thereafter at other locations such as Flossenberg and Regensburg. This, Mr. Parker concluded, was irreconcilable with evidence given by a former German SS officer Franz Suchomil and Treblinka survivors who placed

Ivan the Terrible at Treblinka continuously from July, 1942 until November, 1943.[5]

While Mr. Parker denied that the 1945 Leleko excerpt influenced his doubts about John Demjanjuk, he prominently mentioned Leleko's discussion of Marchenko and Nickolay in notes he prepared in 1979. These notes, like his February 28, 1980 memorandum, are evidence of this state of knowledge at the time. For example, there were striking similarities between the Marchenko discussed by Leleko and the Ivan discussed by survivors as mentioned in Parker's notes. The man named Marchenko noted by Parker in his notes and as

---

[5] Ignot Danil'chenko's name was furnished to Petitioner in interrogatory answers during the denaturalization proceeding but not his statement. Two news reports at the time carried excerpts from the Danil'chenko statement. Petitioner sought to introduce these news reports themselves at the denaturalization trial but they were excluded because of hearsay objections made by the government.

described in the Leleko excerpt acted in the same cruel fashion as the Ivan described in the same section of Parker's notes by survivors and other guards.

Testimony also demonstrated that the 1978 Fedorenko protocols, including the Leleko excerpts and a Soviet guard list, were received by Martin Mendelsohn, a former SLU/OSI supervisor, on or before October 13, 1978. According to Mr. Mendelsohn, they were then given by him to another Department of Justice attorney, Donald Couvillion. (This fact was unknown before Mr. Mendelsohn's testimony.) In his testimony before Judge Wiseman, Mr. Mendelsohn denied reading the 1978 Fedorenko material but admitted receiving it. However, other evidence showed that Mr. Mendelsohn wrote a memorandum referencing another memorandum written by Mr. Parker and Mr. Moscowitz which discussed the 1978

Fedorenko protocols in great detail. (See Petitioner's Hearing Exhibit 129; Respondent's Hearing Exhibit 17) Mr. Mendelsohn was also familiar with both the Demjanjuk and Fedorenko files.

As noted, George Parker and Norman Moscowitz were concerned that John Demjamjuk's name did not appear on the Polish and Soviet guard lists. This was significant exculpatory evidence since Ivan the Terrible was a significant figure at Treblinka and therefore his name should have appeared on one or both of the lists. The Polich list was a list of 43 Treblinka guards "among those known from the approximately 100 guards." It was received by the Department of Justice on August 31, 1979. The Soviet List was a list of guards compiled by the Germans which contained the names of many known Treblinka guards and was received by the Department of

Justice as a part of the 1978 Fedorenko protocols. (Respondent's Appendix 648-663; Petitioner's Hearing Exhibit 45).

During their testimony, both George Parker and Martin Mendelsohn acknowledged that the Policy Main Commission material should have been disclosed in response to Petitioner's discovery requests made during denaturalization. George Parker called this omission an "oversight" and Mr. Mendelsohn reluctantly admitted that the evidence was included within the language of one of Petitioner's interrogatory requests.[6]

---

[6] The Main Commission material was finally released to Petitioner's attorney in August, 1982 long after the denaturalization trial ended because of a demand by Petitioner's attorney for this specific information. Petitioner's attorney was only able to make the demand because a copy of the covering letter to the Main Commission material was sent to him by a defense attorney connected with another OSI case in Chicago. While the Main Commission guard list contained a name "Ivan Marchenko" (among 43 names including others with the first name "Ivan"),

Like the Main Commission material which was improperly withheld from Petitioner during the denaturalization proceeding, the Soviet guard list was also improperly withheld. It was covered by Petitioner's First Request for Documents filed in 1977. Evidence admitted during the hearing before Judge Wiseman shows that government attorneys considered this Request for Documents to be a viable obligation throughout the denaturalization litigation. (See Petitioner's Hearing Exhibits 9, 15, 25, 34 (question 15), 36 and 93). The Soviet guard list was also covered by the language of a June 4, 1979 Motion to Compel as well as letters requesting Soviet information sent to OSI by Petitioner on June 11, 1979;

---

this information was meaningless to Petitioner without the Leleko excerpt. However, importantly, the Department of Justice possessed both the Polish guard list and the Leleko excerpt naming a Marchenko as one of the two motorists. Together, this information was very meaningful.

November 8, 1979; and October 26, 1982. Moreover, at pretrials on June 4, 1979 and November 8, 1979 counsel for the government affirmatively represented to counsel for Petitioner that the government would assist in obtaining material from the Soviet Union.

As noted above, the government's 1988 definition of fraud on the court includes as one element the knowing non-disclsoure of exculpatory evidence. As an example, Petitioner can demonstrate that this element has been met concerning one class of exculpatory evidence -- the guard lists. George Parker's memorandum of February 28, 1980 clearly demonstrates that both he and Norman Moscowitz considered the absence of John Demjanjuk's name on the Polish and Soviet guard lists as significant. (See also the January 24, 1980 memorandum in which Mr. Moscowitz refers to the Soviet guard list

and the absence of Petitioner's name; Petitioner's Hearing Exh. 69A).

Those lists should have been furnished to Petitioner. Government attorneys knew they had the lists; they clearly understood their significance; two attorneys have already testified that the Polish list should have been produced in discovery; the other one was covered by discovery requests; neither list was produced in discovery; they were aware of Petitioner's First Request For Documents which they honored as to some documents on several occasions throughout the denaturalization litigation; they represented to counsel for Petitioner that they would assist in his request for information from the Soviets; and, they knew that the former Soviet Union had refused to supply information directly to counsel for Petitioner. (See Petitioner's Hearing Exhibit 6). Accordingly, Petitioner

can demonstrate that significant evidence called for by discovery was withheld with sufficient knowledge of its relevant to Petitioner's defense and discovery requests.[7]

III. Special Master

There is increasing evidence that the panel's inquiry was the correct action and the use of a Special Master is the appropriate way in which to obtain a record. The panel chose to retain jurisdiction to conduct the inquiry; it was not a matter of choosing among several district courts for a remand. This case was not remanded.

The due process claim on behalf of Mr. Moscowitz is without merit. He has already been subject to one deposition in December,

---

[7] Norman Moscowitz filed a number of discovery responses including those filed on January 31, 1980; April 14, 1980; and April 21, 1980. He also sent two letters to counsel for Petitioner dealing with discovery on March 27, 1981 and August 17, 1982.

1989 concerning aspects of his handling of the Demjanjuk case in connection with a FOIA suit. Mr. Moscowitz was present at crucial times during the litigation and has essential evidence bearing on the issues identified in the panel's August, 1992 Orders. (See the January 24, 1980 memorandum and March 27, 1981 letter to Petitioner's attorney -- Petitioner's Appendix p. 14-15). Counsel for the parties are properly charged with using the adversary system to determine the facts. Moreover, the Special Master has allowed Mr. Moscowitz's counsel a chance to cross-examine witnesses called thus far, thus extending more process than is due. However, while counsel for Mr. Parker availed himself the opportunity to question, Mr. Moscowitz's counsel did not and indeed left Nashville on Friday, November 13 even before it was his turn to examine the second witness.

IV. Standing

Neither Mr. Parker or Mr. Moscowitz have standing to participate as parties in this proceeding. Both are witnesses. Indeed, Mr. Moscowitz is currently a government employee who is being asked to testify about his conduct as a government employee. Furthermore, his employer, through counsel for Respondent, has represented to the Special Master that the government's interest is to "get to the bottom and true facts in the case" and that the witnesses whose activities were in question will testify before the court (Special Master). (Transcript of September 4, 1992 hearing at pp. 17, 19).

While the government has reserved its right to challenge the jurisdiction of this Court and may argue about a proper result after the Special Master's hearing, the government has not sought to abort the

hearings. Nor has it petitioned for rehearing en banc from the August, 1992 Orders of the panel or otherwise sought review in the Supreme Court.

Standing for a non-party witness arises only after a contempt order and a challenge to the subject-matter jurisdiction of the court in defense of a civil contempt action.[8] Catholic Conferences v. Abortion Rights Mobilization, 487 U.S. 72 (1988). See also Karcher v. May, 484 U.S. 72, 77 (198y) (but we

---

[8] However, there would be factual issues to resolve bearing on whether Mr. Moscowitz (or perhaps other witnesses) could challenge this Court's jurisdiction even after a contempt citation. First, if a witness and a party have in any way acted in concert in an appeal to gain an interlocutory ruling on jurisdiction, the witness may be treated as a party for this purpose. Catholic Conference, at 78. Second, this Court may issue discovery orders to non-party witnesses "as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter." Id. at 79. Here, this Court is acting to determine if there was fraud on the court under Hazel-Atlas, supra.

have consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom.); DeMasi v. Weiss, 669 F.2d 114, 122 (3rd Cir. 1982) (without a contempt citation "[a] non-party witness may not obtain appeallate review on the mere issuance of a discovery order requiring production of information or other action.")

Confirming the need for a contempt citation is a 1906 case that is particularly appropriate here. Alexander v. United States, 201 U.S. 117 (1906). In Alexander, the Circuit Court for the Eastern District of Wisconsin had issued orders that a number of witnesses appeal before a special examiner in the case, and that the witnesses answer each and every question put to them respectively by the counsel for the complainant. They were further ordered to produce before such

commissioner certain records for the purpose of examination in the case. The subpoenaed individuals appeared before the examiner but refused to permit the use of the books or answer certain questions "on the ground of this action being the immateriality and irrelevancy of the evidence sought to be adduced." The Circuit Court entered orders requiring the appellants to answer the questions. The non-party witnesses appealed the orders to the Supreme Court.

The Supreme Court held that an order compelling a witness to answer is not final until the witness refuses to answer and then is held in contempt.

> ... [A]n order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an

> appeal. Let the court go farther, and punish the witness for contempt of its order, -- then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case.

Id. at 121.

The Court went on to say that a proceeding before a "special examiner" should be no different from a proceeding before a court, "Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court?" Id.

Furthermore, this Court should distinguish between a procedural or rule-based challenge to the use of the Special Master by the panel and a challenge to the subject-matter jurisdiction of the Court to conduct a factual inquiry. A procedural challenge by a non-party witness may not be

reviewable during a contempt citation appeal. Only a challenge to the jurisdiction of the Court may be reviewed during the subsequent appeal of the contempt citation. The Supreme Court made this point in Catholic Conference:

> We are not confronted here with a non-party witness attempting to challenge its civil contempt by raising matters in which it has no legitimate interest, for instance the District Court's lack of personal jurisdiction over the parties or a limitations statute that would compel dismissal of the action. As to such matters, even if it were ultimately determined that the court should not have allowed the suit to proceeding, the order of process it issued in the conduct of the litigation would still be valid.

Catholic Conference, 478 U.S. at 76-77.

V. Conclusion

Based on the foregoing reasons and because the non-party witnesses who have asked

for En Banc consideration have no standing, their Suggestions should be denied.

Respectfully submitted,

Michael Tigar
School of Law
University of Texas
At Austin
727 East 26th Street
Austin, TX 78705
(512) 471-6319

Edward F. Marek
Federal Public Defender
Skylight Office Tower, #750
1660 West Second Street
Cleveland, Ohio 44113
(216) 522-4856

Michael G. Dane
First Assistant
Federal Public Defender
Skylight Office Tower, #750
1660 West Second Street
Cleveland, Ohio 44113

Attorneys for
Petitioner

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Petitioner's Response to Suggestions for Hearing and Rehearing En Banc by Mr. Norma A. Moscowitz and Mr. George Parker and was

sent via Federal Express at Cleveland, Ohio this 16th day of November, 1992 to Patty Merkamp Stemler, Chief Appellate Section, Criminal Divisoin, Department of Justice, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044, and one copy sent via Federal Express to the following also on November 16, 1992:

Gerald J. Houlihan
Greenberg, Traurig, Hoffman, Lipoff
Rosen & Quentel
1221 Brickell Avenue
Miami, FL 33131
Counsel for Norman A. Moscowitz

Charles P. Goodell, Esq.
Goodell, DeVries, Leech & Gray
Suite 1900, 25 S. Charles Street
Baltimore, MD 21201
Counsel for George Parker

Honorable Thomas A. Wiseman, Jr.,
Special Master
United States District Court for the
Middle District of Tennessee
824 U.S. Courthouse
801 Broadway
Nashville, TN 37203

Edward F. Marek

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DEMJANUK, Petitioner-Appellant v. JOSEPH PETROVSKY, ET AL., Respondents-Appellees	)	No. 85-3435

RESPONDENTS' REPLY TO GEORGE PARKER'S AND NORMAN MOSCOWITZ'S SUGGESTIONS FOR REHEARING EN BANC

1. In February, 1986, after lengthy denaturalization, deportation, and extradition proceedings, petitioner John Demjanjuk was extradited to Israel. On June 5, 1992, the panel of this Court that affirmed the denial of Demjanjuk's petition for habeas corpus seeking to block his extradition (Merritt, C.J., Lively and Keith, JJ.) directed the parties to file briefs addressing the question

whether the extradition proceedings should be reopened.

2. On August 17, 1992, the panel appointed a Special Master to conduct hearings on the question whether Department of Justice attorneys committed a fraud on the extradition court by concealing or withholding exculpatory evidence. In the same order, the Court directed the Special Master to take the testimony of four attorneys who had some involvement in the proceedings against Demjanjuk: Allan Rayn, Jr., Norman Moscowitz, George Parker and John Horrigan.

3. Petitioner subsequently served subpoenas on Mr. Parker and Mr. Moscowitz seeking to compel their testimony before the Special Master.

4. In response to the subpoena directed at him, Mr. Parker filed a Motion to Rescind Order of august 17, 1992 Appointing a Special

Master. In that motion, Mr. Parker argued that this Court lacked authority under Federal Rule of Civil Procedure 53 to appoint a Special Master and that the Court should instead have remanded the matter to the disrict court judge who heard the denaturalization, deportation, and extradition proceedings. On November 4, 1992, the panel denied this motion.

5. On November 5, 1992, Mr. Parker sought en banc consideration by this Court of the panel's denial of his motion to rescind the order appointing the Special Master.

6. Mr. Moscowitz also filed a Motion to Quash the subpoena directed at him. With the motion, Mr. Moscowitz filed a Suggestion for Hearing En Banc asking the Court for initial en banc consideration of his motion. Mr. Moscowitz challenged the panel's jurisdiction on several grounds. He argued that

Demjanjuk's extradition to Israel deprived the Court of jurisdiction and rendered the proceeding moot; that there had been no showing of fraud on the court sufficient to trigger an inquiry of the kind ordered by the panel in its August 17 order; that the panel erred in delegating the matter to a Special Master; that the panel exceeded its authority by expanding the scope of its inquiry from the extradition proceeding to the denaturalization and deportation proceedings; and that the matter should be remanded to the district court judge who presided over the original proceedings against Demjanjuk.

7. In Respondent's Second Brief filed in response to the Court's June 5, 1992, order, respondents raised the arguments, recently reasserted by Mr. Moscowitz, that Demjanjuk's extradition to Israel deprived the Court of jurisdiction and rendered the

proceeding moot and that there had been no showing of fraud on the court sufficient to trigger the Court in reopening the extradition proceeding. Respondents also preserved those arguments in their initial filing before the Special Master. Thus, although the government has complied with the Court's order referring the matter to a Special Master, it continues to adhere to -- and has preserved -- its position that the Court lacked jurisdiction to reopen the extradition proceedings.

8. The government also concurs with Mr. Moscowitz's assertion that the panel that presided over Demjanjuk's appeal of the denial of his petition for habeas corpus seeking to block his extradition has no authority to reopen or otherwise revisit the judgments in the denaturalization and deportation cases.

9. In sum, the government's compliance with the order appointing the Special Master

does not constitute a concession that the Court has the authority to take action with respect to any of the three judgments that this Court has affirmed. Moreover, the government concurs in the suggestion made by Mr. Parker and Mr. Moscowitz that the panel's action may require the attention of the full Court. Although the government has deferred seeking review of the panel's interim order appointing the Special Master until the panel reaches a final decision in this case, it does not oppose Mr. Parker's and Mr. Moscowitz's request for en banc review of the jurisdictional issues at this time.

Respectfully submitted,

PATTY MERKAMP STEMLER
Chief, Appellate Section

DANA D. BIEHL
Deputy Chief,
Terrorism and Violent
Crime Section

NINA GOODMAN
JOSEPH DOUGLAS WILSON
Attorneys, Appellate
Section
Criminal Division
Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Respondents' Reply to George Parker's and Norman Moscowitz's Suggestions for Rehearing En Banc were this day mailed to counsel for petitioner and to the Special Master at the following addresses:

Edward F. Marek
Federal Public Defender
Northern District of Ohio
Skylight Office Tower - Suite 750
1660 West Second Street
Cleveland, Ohio 44113

Michael E. Tigar
School of Law
University of Texas at Austin
727 East 26th Street
Austin, Texas 78705

Gerald J. Houlihan
Greenberg, Traurig, Hoffman, Lipoff
Rosen & Quentel
1221 Brickell Avenue
Miami, FL 33131

Charles P. Goodell, Esq.
Goodell, DeVries, Leech & Gray
Suite 1900, 25 S. Charles Street
Baltimore, MD 21201

Honorable Thomas A. Wiseman, Jr.,
Special Master
United States District Court for the
Middle District of Tennessee
824 U.S. Courthouse
801 Broadway
Nashville, TN 37203

JOSEPH DOUGLAS WILSON
Attorney
Appellate Section
Criminal Division
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044
(202) 514-2611

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK, Petitioner-Appellant,	:	
-vs-	:	CASE NO. 85-3435
JOSEPH PETROVSKY, et al., Respondents-Appellees.	:	

PETITIONER'S MOTION TO STRIKE RESPONDENT'S REPLY TO GEORGE PARKER'S AND NORMAN MOSCOWITZ'S SUGGESTIONS FOR REHEARING EN BANC

(1) On November 17, 1992, Respondent filed a reply to George Parker's and Norman Moscowitz's suggestions for hearing and rehearing en banc in this case.

(2) Rule 35(c), Federal Rules of Appellate Procedure, requires a party who desires to "suggest" a hearing or rehearing en banc to comply with strict time requirements (suggestion for a hearing en banc by the date of an appellee(s) brief is to be filed;

suggestion for rehearing en banc within fourteen (14) days after entry of judgment).

(3) In its response (at ¶ 8 and 9) Respondent states that (1) the government concurs with Mr. Moscowitz's assertion that the extradition panel had no authority to reopen or otherwise revisit the judgments in the denaturalization and deportation cases; and (2) "the government concurs in the suggestion made by Messrs. Parker and Moscowitz that the panel's action may require the attention of the full Court." These are nothing less than "suggestions" for hearing and rehearing en banc. As they are beyond the time limits of Rule 35(c), they should be stricken and disregarded.

(4) Both Mr. Parker and Mr. Moscowitz lack the standing required by Rule 35(b) and (c) that only a party may suggest a hearing or rehearing en banc. Respondent's concurrence

as a party in their suggestions will not provide the standing lacking under Rule 35.

(5) The Clerk has invited the parties to respond to either or both of the en banc requests. Petitioner requests leave to file this motion to strike and asserts that it is within the scope of the Clerk's invitation.

Respectfully submitted,

EDWARD F. MAREK (#0032180)
Federal Public Defender
Skylight Office
1660 West 2nd Street #750
Cleveland, Ohio 44113
(216) 522-4856

MICHAEL G. DANE (#0034206)
First Assistant
Federal Public Defender
1660 West 2nd Street #750
Cleveland, Ohio 44113
(216) 522-4856

MICHAEL E. TIGAR
School of Law
University of Texas
at Austin
727 East 26th Street
Austin, TX 78705

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's Motion to Strike Respondent's Reply to George Parker's And Norman Moscowitz's Suggestions For Rehearing En Banc was sent via Federal Express Mail this 17th day of November, 1992 to:

Honorable Thomas A. Wiseman, Jr.
United States District Court
Middle District of Tennessee
824 U.S. Courthouse
801 Broadway
Nashville, Tennessee 37203

Gerald J. Houlihan, Esquire
GREENBERG, TRAURIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL
1221 Brickell Avenue
Miami, Florida 33131
Counsel for Norman Moscowitz

Patty Merkamp Stemler
Chief, Appellate Section
Criminal Division
Department of Justice
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044

Charles P. Goodell, Jr., Esquire
GOODELL, DE VRIES, LEECH & GRAY
25 S. Charles Street, # 1900
Baltimore, Maryland 21201
Counsel for George Parker

Edward F. Marek
Federal Public Defender
1660 West 2nd Street #750
Cleveland, Ohio 44113
(216) 522-4856

No. 85-3435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
JOSEPH PETROVSKY, ET AL.,	)	
	)	
Respondents-Appellees.	)	
	)	

BEFORE: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestions for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and conclude that the issues raised in the petitions were fully considered. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

FILED

DEC 02 1992

LEONARD GREEN, Clerk

Supreme Court, U.S.
FILED
FEB 24 1993
OFFICE OF THE CLERK

NO. 92-1350

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IN RE GEORGE L. PARKER,
Petitioner,

v.

GILBERT S. MERRITT,
CHIEF JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAMON J. KEITH,
CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT, AND

PIERCE LIVELY,
SENIOR CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT,
Respondents.

BRIEF IN OPPOSITION TO GEORGE L. PARKER'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

Michael E. Tigar
727 E. 26th Street
Austin, Texas 78705
(512) 471-6319
(Counsel of Record)

Edward F. Marek
Office of the Federal Defender
Skylight Office Tower
Suite 750
1660 West 2nd Street
Cleveland, Ohio 44113-1454
(216) 522-4856

Attorneys for John Demjanjuk
Respondent

February 23, 1993

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. Petitioner Parker lacks standing to challenge the procedures by which the Sixth Circuit has chosen to investigate fraud on the court	5
II. It would be an improper use of the extraordinary writ of mandamus for this Court to stay the Sixth Circuit's investigation of fraud on the court	9
a. If Petitioner has standing to obtain an extraordinary writ, then he also has standing to appeal from an adverse finding, and therefore there is an adequate remedy at law	9
b. Petitioner alleges no actions by the Sixth Circuit which would justify the issuance of an extraordinary writ of mandamus	11
III. With regard to Petitioner Parker, this case is moot	17
IV. The equities of this case favor a speedy resolution of this dispute and militate against the issuance of an extraordinary writ of mandamus	19
CONCLUSION	21

TABLE OF AUTHORITIES

PAGE

CASES:

Alexander v. United States, 201 U.S. 117 (1906)..... 7

Baker v. Carr, 369 U.S. 186 (1962)..... 6

Bankers Life & Casualty Co. v. Holland,
346 U.S. 379 (1953)..... 14

Beacon Theatres, Inc v. Westover, 359 U.S. 500 (1959)... 16

Bender v. Williamsport Area School Dist.,
475 U.S. 534 (1986)..... 6

Blair v. United States, 250 U.S. 273 (1919)..... 6

Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1991)..... 13

Dairy Queen v. Wood, 369 U.S. 469 (1962)..... 15

DeGaston v. Dillon, 247 F.Supp. 511 (1963)
affirmed sub. nom Degaster v. Fowler,
354 F.2d 515 (D.C. Cir. 1955)..... 19

Ex Parte Fahey, 332 U.S. 258 (1947)..... 9

Ex Parte Newman, 81 U.S. 152 (1871)..... 12

Ex Parte Perry, 102 U.S. 183 (1880)..... 12

Ex Parte Sawyer, 88 U.S. 235 (1874)..... 12

First National Bank of Waukesha v. Warren,
796 F.2d 999 (7th Cir. 1986)..... 16

Gulfstream Aerospace v. Mayacamas Corp.,
485 U.S. 271 (1988)..... 12

Hazel-Atlas Glass Co. v. Hartford Empire Co.,
322 U.S. 238 (1944)..... 13

In re Armco, Inc., 770 F.2d 103 (8th Cir. 1985)..... 15

In re Bituminous Coal Operators' Ass'n, inc.,
949 F.2d 1165 (D.C. Cir. 1991)..... 15

In re First Federal Sav. and Loan Ass'n of Durham,
860 F.2d 135 (4th Cir. 1988)..... 19

In re Watkins, 271 F.2d 771 (5th Cir. 1959)..... 15

Interstate Commerce Commission v. U.S. ex rel Campbell, 289 U.S. 385 (1933)..... 11

La Buy v. Howes Leather Co., 352 U.S. 249 (1957).....4,13-16

Mallard v. U.S. Dist. Court for the Southern Dist. of Iowa, 490 U.S. 296 (1989)..... 10

Marbury v. Madison, 1 Cranch 137 (1803)..... 10

Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982)..... 19

Office of Thrift Supervision v. Dobbs, 931 F.2d 956 (D.C.Cir. 1991)..... 18

Parr v. United States, 351 U.S. 513 (1956)..... 14

Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943)..... 11

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976)..... 6

Stern v. South Cester Tube Co., 390 U.S. 606 (1968)..... 19

Thermatron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976)..... 15

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977)..... 9

United States Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72 (1988)..... 7,8

United States v. Dern, 289 U.S. 352 (1933)..... 19

United States v. Kis, 658 F.2d 526 (7th Cir. 1981), cert. denied sub. nom. Salkin v. U.S., 455 U.S. 1018 (1982)..... 19

United States v. Ryan, 402 U.S. 530 (1971)..... 7

Whitehorse v. Ill. Central R. Co., 349 U.S. 366 (1955)..... 19

Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978)..... 16

Will v. United States, 389 U.S. 90 (1967).....10, 14-16

STATUTES:

18 U.S.C. § 3184..... 5

FEDERAL RULES OF CIVIL PROCEDURE:

Fed. R. Civ. P. 53..... 8

MISCELLANEOUS:

"And More on Mr. Demjanjuk", Washington Post, Nov. 15, 1992, at c06..... 17

"Attorney Testifies that Demjanjuk's Extradition was a Mistake", St. Paul Pioneer Press, Nov. 13, 1992, at 8A..... 17

"Demjanjuk Case Stirs New Doubt Ex-Prosecutor Says Fears Were Ignored"; San Jose Mercury News, Nov. 13, 1992, at 6E..... 17

Joe Edwards, "Judge Told that Demjanjuk Wasn't 'Ivan' A Former Justice Lawyer Testified. He said the wrong man deported", Philadelphia Inquirer, Nov. 13, 1992, at A26..... 17

Eric Harrison, "Probe of Nazi War Criminal Case Raises Ethics Questions. Government: A former Justice Dept. attorney said he resigned over handling of possibly exculpatory evidence concerning the accused", Los Angeles Times, Nov. 13, 1992, at A4..... 17

"Ivan's Terrible Treatment the Issue: The John Demjanjuk Case--Our View: He should be returned to the U.S." Rocky Mountain News, Nov. 15, 1992, at 161..... 17

"Justice Dept. Lawyer Reports He Voiced Doubt on Demjanjuk", Boston Globe, Nov. 13, 1992, at 12..... 17

Nightline (ABC television broadcast, December 23, 1991)..... 17

Bill Sloat & Micelle Lesie, "Ivan Probe Prosecutor Testifies He Doubted, Then Quit", Cleveland Plain Dealer, Nov. 13, 1992, at 20A..... 17

Wright & Miller, Federal Practice and Procedure §3533.1 (1984)..... 18

Statement of the Case

John Demjanjuk was extradited to Israel on February 27, 1987. He was convicted there in 1988 for crimes committed by "Ivan the Terrible", the ruthless Nazi guard of the Treblinka gas chambers during World War II. The Israeli Court sentenced Mr. Demjanjuk to death; he is currently in Israel in solitary confinement under 24 hour surveillance awaiting a final determination by the Israeli Supreme Court.

In 1985, the United States Court of Appeals for the Sixth Circuit had upheld the extradition of Mr. Demjanjuk by declining to issue a writ of habeas corpus to stop the process. 776 F.2d 571 (6th Cir. 1985). On June 5, 1992, the Sixth Circuit, sua sponte, issued an order beginning an inquiry to determine whether Demjanjuk's extradition may have been based on erroneous information. The June 5 order asked, inter alia, for a brief from the United States describing all information in the government's possession tending to show Demjanjuk was not "Ivan the Terrible." A second order issued on June 18 asked the parties to brief relevant international law issues, "in light of possible new evidence that Demjanjuk is not 'Ivan the Terrible'."

On August 17, after briefing and oral argument pursuant to the orders of June 5 and June 18, the Sixth Circuit panel issued a third order. The order of August 17 recounted the motivation for the court's reopening of the case:

> [T]he court's inquiry concerns whether lawyers from the Department of Justice engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious

> Ukrainian guard known as 'Ivan the Terrible' who operated the gas chambers at the Treblinka, Poland death camp. The 'bedrock question' for the court ... is whether the failure of the attorneys to disclose such exculpatory information constituted fraud upon the court that mislead this court into allowing Demjanjuk to be extradited.

In order to procure information the Sixth Circuit panel deemed "essential" for reaching a decision on the issue of fraud, the court appointed Judge Thomas Wiseman of the Middle District of Tennessee as Special Master to conduct hearings and report back to the Sixth Circuit.

Petitioner George Parker was called as a witness in the Special Master proceedings; he took the stand before Judge Wiseman on November 12, 1992. His testimony is a matter of public record. Petitioner Parker was one of the lead attorneys during the initial Demjanjuk denaturalization investigation at the Justice Department's Office of Special Investigations (OSI)--the Nazi hunting office of the Department. Mr. Parker swore under oath that he had had serious doubts at the time the investigation against Mr. Demjanjuk was proceeding in 1979-1980 that Mr. Demjanjuk was in fact "Ivan the Terrible". Petitioner Parker testified extensively about a five page single-spaced memorandum that he had written to the Director and Deputy Director of OSI, outlining his doubts about the case. Petitioner Parker testified that by pursuing the Treblinka charges, he believed that the Department was skirting the ethical obligations which should bind government lawyers in this cas. Petitioner Parker testified that he later left his position as a government

attorney in part because of the way the Demjanjuk investigation had been carried out.

Having testified that he believed that John Demjanjuk was not Ivan the Terrible of Treblinka, petitioner Parker now asks this Court for a writ of mandamus or prohibition to stop the hearings being conducted by the Sixth Circuit with the assistance of Judge Wiseman as special master.

Summary of Argument

George Parker lacks the standing necessary to petition this Court for an extraordinary writ. A basic requirement of standing is that the party claiming standing must be aggrieved by a prospective judgement. Petitioner Parker is--by his own admission--not a party to this dispute; he is a non-party witness. A judgement against the government will have no adverse legal impact for Petitioner Parker. It is only in the most unusual circumstances that a non-party witness may make procedural challenges to a proceeding. Having declined to suffer a contempt citation in order to challenge the jurisdiction of the Special Master, Parker now lacks standing to challenge the Sixth Circuit's procedures.

The use of the extraordinary writ of mandamus would be inappropriate in this case. Mandamus should not issue where there is another adequate remedy available. If petitioner Parker has the standing he claims (but which respondent does not concede) then the avenue of appeal is available after an adverse judgement by the Sixth Circuit. Moreover, mandamus may not be

used to challenge a Court's actions in the exercise of its proper jurisdiction. Only when a court has refused to act, or has acted completely outside of its jurisdiction may a superior court issue a writ of mandamus. In this instance, the Sixth Circuit has acted. An investigation of fraud on the court is clearly within the Sixth Circuit's jurisdiction. Thus, mandamus is inappropriate. The writ may not be used to dictate the manner of a judge's action. The case of La Buy v. Howes Leather Co., 352 U.S. 249 (1957) is inapposite. The inquiry by the Special Master in this instance is being conducted by a sitting federal judge and the inquiry is not a trial. These facts distinguish the current case from La Buy.

This case is moot with regard to petitioner Parker. Petitioner Parker has testified under oath in open court. Parker asserts that he may suffer reputational injury from a finding by the Sixth Circuit, based in part on his testimony. Having testified, Parker may not now complain of the process by which his testimony was procured. Speculative reputational harm or professional injury are not adequate to make ripe for decision an otherwise moot case.

Finally, the equities of this case militate against the issuance of an extraordinary writ to stop the Special Master proceeding. Mandamus is governed by equitable principles. The Sixth Circuit is attempting to determine whether Justice Department attorneys conducted a fraud on the court in order to procure the extradition of John Demjanjuk. The former government attorney who has stated under oath that he believed that John

Demjanjuk was not "Ivan the Terrible," the offense for which Demjanjuk was extradited, now asks for a halt in the proceedings designed to determine whether judicial approval of the extradition was erroneous. Mandamus should be withheld where the equities do not favor the issuance of the writ.

Argument

I. Petitioner Parker lacks standing to challenge the procedures by which the Sixth Circuit has chosen to investigate fraud on the court.

George Parker has petitioned the Court for a writ of prohibition or mandamus to halt the Sixth Circuit's Special Master proceeding because "his individual rights may be violated or denied." Petition at 13. By his own admission Parker is not a party to the ongoing dispute between John Demjanjuk and the United States Government. Petition at 17. His only role is as a witness called to testify about the procedures in the Office of Special Investigations and his own actions during the denaturalization proceedings against John Demjanjuk over a decade ago. Parker has no standing to challenge the Sixth Circuit's method of conducting this investigation. A basic requirement for standing is that a party claiming standing must be aggrieved by the prospective judgment. The crux of the dispute in this case is whether judicial approval under 18 U.S.C. § 3184 for Mr. Demjanjuk's extradition to Israel was improperly procured by the Justice Department. An adverse finding against the government would have no legal impact for Mr. Parker.

At an irreducible minimum, article III requires that the party who invokes the court's authority show that he personally has suffered some actual or threatened injury as the result of the putatively illegal conduct of the defendant, and that the injury can fairly be traced to the challenged action and is likely to be redressed by a favorable decision. Bender v. Williamsport Area School Dist., 475 U.S. 534, 542 (1986), Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976). Beyond the constitutional requirements, the Court has expressed a prudential concern that the plaintiff's stake in the outcome be adequate to assure "the concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult ... questions." Baker v. Carr, 369 U.S. 186, 204 (1962). Because Parker does not suffer from any redressable injury from the prospective judgment of the Sixth Circuit, and because his stake in the outcome is tangential at best, this Court should deny the requested writ for lack of standing.

A finding that Petitioner Parker has standing to make a procedural challenge in a court proceeding in which his only role is as a nonparty witness would set a remarkable precedent. This Court has in the past severely constrained the rights of nonparty witnesses to challenge court proceedings. A nonparty witness is not permitted to make objections of incompetency or irrelevancy, "for this is no concern of his." Blair v. United States, 250 U.S. 273, 282 (1919). "[I]t is in the ordinary case no concern of one summoned as a witness whether the offense is within the

jurisdiction of the court or not." Id. The Court has limited nonparty witnesses' rights to a jurisdictional challenge via the appeal of a contempt citation for refusal to testify. United States Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72 (1988). Except in the unique circumstance of a contempt citation, a nonparty witness may not obtain appellate review of a court's order requiring testimony or production of documents. See United States v. Ryan, 402 U.S. 530, 532 (1971)("If... the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him."). In Alexander v. United States, 201 U.S. 117 (1906) the Circuit Court for the Eastern District of Wisconsin had issued orders that a number of witnesses appear before a "special examiner" to answer questions and produce requested documents. The subpoenaed witnesses appeared but refused to answer certain questions or permit the use of certain papers "on the ground of this action being the immateriality and irrelevancy of the evidence sought to be adduced." The Circuit Court ordered the witnesses to answer the questions and the nonparties appealed to this Court. This Court held that the only means of review for the nonparty witness was to refuse to testify and then challenge the contempt order:

> [A]n order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as orders under review, but from such a ruling it is not contended there is an appeal. Let the court go further, and punish the witness for contempt of its order, --then arrives the right of review...."

Id. at 121. Petitioner Parker could have challenged the jurisdiction of the Sixth Circuit by refusing to testify and by being held in contempt. To his credit, Parker did not choose that route. But appeal through contempt is the only method by which a nonparty witness may challenge the order of a court.

Moreover, it is important to distinguish between a rule-based challenge and a jurisdictional challenge to a court's authority. Nowhere in his petition does Parker question the jurisdiction of the Sixth Circuit to investigate fraud on the court. Rather, Parker questions the procedure used by the Sixth Circuit to conduct the investigation.[1] The Supreme Court in Catholic Conference made clear that a non-jurisdictional attack on court procedures by a nonparty would not be tolerated even through a contempt citation:

> We are not confronted here with a non-party witness attempting to challenge its civil contempt by raising matters in which it has no legitimate interest, for instance the District Court's lack of personal jurisdiction over the parties or a limitations statute that would compel dismissal of the action. As to such matters, even if it were ultimately determined that the court should not have allowed the suit to proceed, the order or process it issued in the conduct of the litigation would still be valid.

Catholic Conference, 487 U.S. at 76-77. Because Parker is a nonparty witness who will not be aggrieved by an adverse judgment of the Sixth Circuit, and because he attacks procedures and not

---

[1] See Petition at 72 (asking that the cause be remanded to the Sixth Circuit "for its consideration of a more appropriate course of action consistent with the requirements of Fed. R. Civ. P. 53").

the jurisdiction of that Court, he lacks standing to petition for a writ of mandamus.

II. It would be an improper use of the extraordinary writ of mandamus for this Court to stay the Sixth Circuit's investigation of fraud on the court.

a. If Petitioner has standing to obtain an extraordinary writ, then he also has standing to appeal from an adverse finding, and therefore there exists an adequate remedy at law.

Petitioner Parker may not obtain review of the Sixth Circuit's investigation of fraud on the Court via a mandamus petition.[1] Mandamus is resorted to where appeal is clearly inadequate and the writ is reserved for truly extraordinary causes. These prohibitions are particularly relevant where mandamus is requested against a judge. Ex Parte Fahey, 332 U.S. 258, 259-60 (1947). Petitioner Parker claims that he has no other adequate remedy available to challenge the appointment of the Special Master, bemoaning the United States' reluctance to take immediate action. Petition at 22-23.[2] But if Petitioner Parker has standing to obtain a writ of mandamus, as he claims, see Petition pp. 17-21, then he would also have standing to obtain review through appeal after the final determination by the Sixth Circuit.[3]

---

[2] "[T]he government has deferred seeking review of the panel's interim order appointing a special master until the panel reaches a final decision in this case...." Respondent's [The United States'] Reply Brief to George Parker's and Norman Moscowitz' suggestions for rehearing en banc, reprinted in Petition at A-138.

[3] If injured in a fashion adequate to support standing, Petitioner Parker would be able to intervene after final judgment and seek to appeal the Sixth Circuit's findings. See e.g., United

While Mr. Demjanjuk does not concede that Petitioner Parker has standing to challenge actions by the Sixth Circuit (see Part I, supra), taken on its own terms Petitioner's argument is internally inconsistent. In order to establish the standing necessary to obtain an extraordinary writ, Parker makes reference to cases granting nonparties the right to appeal. If petitioner Parker does have the nonparty standing he claims, then like the government, he may assail the procedures used by the Sixth Circuit after a final decision.

No writ may be granted where there is an adequate remedy through the appellate process. See Mallard v. U.S. Dist. Court for the Southern Dist. of Iowa, 490 U.S. 296, 309 (1989) ("[P]etitioners must show that they lack alternative means to obtain the relief they seek, and carry the burden of showing that their right to issuance of the writ is clear and indisputable.")(citations omitted); Will v. United States, 389 U.S. 90, 96 (1967)(mandamus may never be employed as a substitute for appeal); Marbury v. Madison, 1 Cranch 137, 169 (1803)("Still, to render the mandamus a proper remedy ... the person applying for it must be without any other specific and legal remedy.") Because, if Petitioner Parker has the standing he claims, he would also be able to appeal a final judgment, a mandamus action before final judgment is improper.

Airlines, Inc. v. McDonald, 432 U.S. 385 (1977)(permitting post-judgment intervention by nonparty for purpose of appeal).

b. Petitioner alleges no actions by the Sixth Circuit which would justify the issuance of an extraordinary writ of mandamus

Beyond the fact that Petitioner Parker--if he has any standing at all--must wait for a proper appeal, the principles of mandamus do not permit the issuance of a writ under the facts alleged in the petition. The Sixth Circuit has not declined to exercise its jurisdiction; nor does Parker allege that the Court has exceeded its jurisdiction in appointing a Special Master. Rather, petitioner Parker complains of a decision made by the Sixth Circuit in the exercise of its jurisdiction. See Petition at 15 (complaining of the Sixth Circuit's failure to make findings of exceptional circumstances necessitating the appointment of a special master); petition at 52 (asking that the writ be issued so that the Sixth Circuit may consider a "more appropriate course of action").

A writ of mandamus may not be used to challenge a court's actions in the exercise of its proper jurisdiction. An inferior court may only be ordered through mandamus that it must exercise its jurisdiction, or be instructed that it has engaged in a usurpation of power. Mandamus may not be used to order a lower court to re-evaluate an abuse of discretion. Will v. United States, 389 U.S. 90, 104 (1967); See Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 27 (1943)(refusing to issue writ where an inferior court "acted within its jurisdiction" even though the action taken may have been erroneous); Interstate Commerce Commission v. U.S. ex rel Campbell, 289 U.S. 385, 394 (1933)("If mandamus were to stand...the result would be to compel an

adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is the appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action."); Ex Parte Perry, 102 U.S. 183, 186 (1880)("We cannot by mandamus correct the judicial errors committed by an inferior court in the progress of a cause. We can in this way, in a proper case, compel an inferior court to act, but cannot control its decisions while acting."); Ex Parte Sawyer, 88 U.S. 235, 238 (1874)("A superior court may by mandamus set the machinery of an inferior court in motion, but when that has been done, its power under that form of proceeding is at an end. The inferior court is supreme within its own jurisdiction, so long as it is acting."); Ex Parte Newman, 81 U.S. 152, 165 (1871)("[T]he only office of the writ [of mandamus] when issued to a subordinate court is to direct the performance of a ministerial act or to command the court to act in a case where the court has jurisdiction and refuses to act, but the supervisory court will never prescribe what decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.").

There is no valid argument that the Sixth Circuit's action constituted the "usurpation of power" necessary to justify mandamus. See Gulfstream Aerospace v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Petitioner Parker is complaining only that the Sixth Circuit decided to engage in fact-finding by delegating the

task of taking evidence during an inquiry into fraud on the court to one federal judge rather than another. It is beyond dispute that the Sixth Circuit has the authority to inquire into the issue of fraud on the Court. Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1991); Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944). The challenged action by the Sixth Circuit is a wholly proper exercise of discretion, unreviewable by mandamus.

Petitioner Parker relies heavily on La Buy v. Howes Leather Co., 352 U.S. 249 (1957), a case where this Court affirmed the issuance of a writ of mandamus ordering a district judge to vacate a reference order to a non-judge special master under F.R.C.P. 53. La Buy was a hotly debated 5-4 opinion which is distinguishable on its facts and by subsequent decisions of the Court. In La Buy, the district judge had referred entire civil antitrust trials to a master on the basis that the district judge feared full trial proceedings would take too long, clogging his busy docket. In affirming the Circuit Court's mandamus order, this Court was concerned that the litigants had been denied their right to a trial by an article III judge for no "exceptional" reason. La Buy, 325 U.S. at 258.[4] The Circuit court that had

[4] Apparently the reference of cases to non-judge lawyers was of particular concern to the La Buy majority as it cited in a footnote a passage from a then current casebook on Judicial Administration:

> There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all-too-prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as a referee. Only a drastic administrative rule...will put to rout this inveterate enemy of dispatch in the trial of cases.

issued the mandamus order was aware of the district judge's propensity to abuse the special master process.

That there was no intent in the La Buy decision to permit interlocutory review via mandamus of all discretionary applications of the federal rules was subsequently made clear in Will v. United States, 389 U.S. 90, 96 (1967). In Will, this Court described La Buy as a case where the judge had displayed "a persistent disregard for the federal rules." Will, supra at 104 n.14. Finding no pattern of "deliberate disregard for the federal rules" in the record in Will, the Court declined to issue the requested writ:

> In La Buy, however, we specifically relied upon evidence in the record which showed a pattern of improper references of cases to special masters by the District Judge. There is no evidence in this record concerning petitioner's practice in other cases, aside from his own remark that the government is generally dissatisfied with it, and his statements do not reveal any intent to evade or disregard the rules.

Id. at 104-05. No such allegation has been made in Parker's petition. While the instant case involves the same rule (F.R.C.P. 53) as La Buy, Parker's petition is best analogized to the situation found in Will:

> Thus, the most that can be claimed on this record is that petitioner may have erred in ruling on matters within his discretion. See Parr v. United States, 351 U.S. 513, 520 (1956). But "[t]he extraordinary writs do not reach such cases; they may not be used to thwart the congressional policy against piecemeal appeals." Id., at 520-521. Mandamus, it must be remembered, does not run the gauntlet of reversible errors." Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953). Its office is not to "control the decision of the trial court," but rather merely to

---

La Buy, 352 U.S. at 253 n.5 (citation omitted).

> confine the lower court to the sphere of its discretionary power. Id. at 383. Thus, the record before us simply fails to demonstrate the necessity for the drastic remedy employed.

Will, 389 U.S. at 103-04 (parallel citations omitted).

Beyond the lack of a "pattern of disregard" for the rules, other facts distinguish La Buy from the instant case. La Buy involved the reference of an entire trial to a master. The master in La Buy was not an article III Judge. Other courts have agreed that a reference of an entire trial, or reference to a non-judge master is a clear abuse of discretion, to be cured through mandamus under La Buy. See e.g., In re Bituminous Coal Operators' Ass'n, inc., 949 F.2d 1165, 1169 (D.C. Cir. 1991)(special master may not be appointed as a "surrogate judge" to try the controversy and determine liability); In re Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985)(district court erred in granting the master authority to preside at trial on the merits but reference for other purposes held proper); In re Watkins, 271 F.2d 771, 775 (5th Cir. 1959)(mandamus appropriate where reference to master "nullifies the right to an effective trial before a constitutional court"). Thus, to the extent that mandamus is used to guarantee a party the right to trial before a constitutionally appropriate fact-finder, La Buy is in keeping with Supreme Court precedent. See Thermatron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976)(mandamus appropriate to correct a clearly erroneous remand of case out of a federal forum); Dairy Queen v. Wood, 369 U.S. 469, 472 (1962)(mandamus appropriate to protect constitutional right to trial by jury);

Beacon Theatres, Inc v. Westover, 359 U.S. 500 (1959)(same). The Sixth Circuit referred the fact-finding duties in this case to a sitting federal Judge--Judge Wiseman of the Middle District of Tennessee. Judge Wiseman is anything but the "temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work" that the supreme Court had warned against as a fact-finder in La Buy. La Buy, 325 U.S. at 259. Moreover, the investigation taking place in Nashville is not a trial. It is an inquiry into prosecutorial misconduct during proceedings long past. Therefore, La Buy is inapplicable on its facts.

Moreover, to the extent that La Buy was a decision generally granting superior courts "supervisory control" over inferior courts though the use of mandamus, it is dubious precedent. In this regard, "La Buy is defunct. Although the Court has not yet erected the tombstone, it has ordered flowers." First National Bank of Waukesha v. Warren, 796 F.2d 999 (7th Cir. 1986)(opinion of J. Easterbrook). See also, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665-66 n.7 (1978)("Although in at least one instance we approved the issuance of the writ upon a mere showing of an abuse of discretion, La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957), we warned soon thereafter against the dangers of such a practice.")(plurality opinion)(citing Will v. United States).

Because the Sixth Circuit's action does not fit the requirements for a writ of mandamus under La Buy, and because the Sixth Circuit was exercising its sound discretion by appointing one federal judge rather than another to investigate fraud on the

Sixth Circuit court, no writ of mandamus should issue in this case.

III. With regard to Petitioner Parker, this case is moot.

Petitioner Parker alleges that the findings of Special Master Wiseman will "affect George L. Parker's reputation, his livelihood and his future in his chosen profession." Petition at 50. But Mr. Parker has already testified under oath before the Special Master. This testimony was widely covered in the national press.[5] He had also given interviews to the television media regarding his involvement in the Demjanjuk case prior to the case being reopened. See e.g., Nightline, (ABC television broadcast, December 23, 1991).

[5] A summary Westlaw search in the PAPERS library revealed more than 70 articles containing the words "Parker" and "Demjanjuk". See e.g. "And More on Mr. Demjanjuk", Washington Post, Nov. 15, 1992, at c06 (citing petitioner Parker's testimony before the Special Master and beginning with the words, "The revelations of gaps and shabby dealing in the John Demjanjuk case have now crossed the line from troubling to genuinely dreadful."); Eric Harrison, "Probe of Nazi War Criminal Case Raises Ethics Questions. Government: A former Justice Dept. attorney said he resigned over handling of possibly exculpatory evidence concerning the accused", Los Angeles Times, Nov. 13, 1992, at A4, Home Edition (citing petitioner Parker's testimony); "Justice Dept. Lawyer Reports He Voiced Doubt on Demjanjuk", Boston Globe, Nov. 13, 1992, at 12 (citing petitioner Parker's testimony); Joe Edwards, "Judge Told that Demjanjuk Wasn't 'Ivan' A Former Justice Lawyer Testified. He said the wrong man deported", Philadelphia Inquirer, Nov. 13, 1992, at A26. (citing petitioner Parker's testimony); "Demjanjuk Case Stirs New Doubt Ex-Prosecutor Says Fears Were Ignored"; San Jose Mercury News, Nov. 13, 1992, at 6E (citing petitioner Parker's testimony); "Ivan's Terrible Treatment the Issue: The John Demjanjuk Case--Our View: He should be returned to the U.S." Rocky Mountain News, Nov. 15, 1992, at 161 (citing petitioner Parker's testimony); "Attorney Testifies that Demjanjuk's Extradition was a Mistake", St. Paul Pioneer Press, Nov. 13, 1992, at 8A; Bill Sloat & Micelle Lesie, "Ivan Probe Prosecutor Testifies He Doubted, Then Quit", Cleveland Plain Dealer, Nov. 13, 1992, at 20A (referring to petitioner Parker).

Because petitioner Parker has testified and all of the evidence surrounding his involvement with the Demjanjuk case is now a matter of public record on file with the Special Master in Nashville, the petition is moot. "Mootness determinations are concerned in large part with the determination whether any effective purpose can still be served by a specific remedy." Wright & Miller, Federal Practice and Procedure §3533.1 (1984). Had Parker chosen to resist the subpoena compelling him to testify, his complaints about the procedures used by the Sixth Circuit would be ripe. But having testified, Parker cannot now complain about the process by which his testimony was procured.

In Office of Thrift Supervision v. Dobbs, 931 F.2d 956 (D.C.Cir. 1991), the OTS had issued a subpoena duces tecum requiring the production of certain documents and an appearance at a deposition. Citing numerous decisions of other courts, the D.C. Circuit dismissed an appeal challenging the subpoena on the ground that Dobbs had already complied and OTS had obtained his testimony. See id. at 957 and cases cited therein. As to Dobbs' complaint that he remained subject to the subpoena and could be called to testify again, the court found that "future speculative action that may never occur is insufficient to create a concrete present controversy." Id. at 958. See also, United States v. Kis, 658 F.2d 526, 532-33 (7th Cir. 1981), cert. denied sub. nom. Salkin v. U.S., 455 U.S. 1018 (1982)(appeal to prevent future use of compelled evidence dismissed as moot because such use would be highly speculative). Injuries which are too speculative do not

merit extraordinary relief. Whitehorse v. Ill. Central R. Co., 349 U.S. 366, 373 (1955).

Parker's complaints about the potential for future injury in his professional life on the basis of theoretical disciplinary action by a hypothetical body are also moot, because any such action is highly speculative.[6] There is no live controversy regarding petitioner Parker and the writ of mandamus should be denied.[7]

IV. The equities of this case favor a speedy resolution of this dispute and militate against the issuance of an extraordinary writ of mandamus.

While mandamus is available only in an action at law, it is governed by equitable principles. Stern v. South Cester Tube Co., 390 U.S. 606, 609 (1968). "[Mandamus] may be refused for reasons comparable to those which would lead a court in equity, in the exercise of its sound discretion, to withhold its protection of an undoubted legal right." United States v. Dern, 289 U.S. 352, 359 (1933). See also In re First Federal Sav. and Loan Ass'n of Durham, 860 F.2d 135, 140 (4th Cir. 1988)(court should not overlook principles of fairness when they are enmeshed in mandamus considerations); DeGaston v. Dillon, 247 F.Supp. 511 (1963) affirmed sub. nom Degaster v. Fowler, 354 F.2d 515 (D.C.

---

[6] Moreover, it is presumed that Mr. Parker's rights will be adequately protected in any state disciplinary proceeding that may be brought against him. See Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

[7] An apparent acceptable remedy to Mr. Parker -- remand to the district court judge who heard the denaturalization and extradition cases -- would not avoid the type of public inquiry that is now taking place before the Special Master and from which Mr. Parker requests relief.

Cir. 1955)(mandamus denied because plaintiff came into court with unclean hands).

Petitioner Parker has insisted that additional delay "will not prejudice any of the witnesses or parties" while there is the potential for "grave harm" to George L. Parker if the proceeding is allowed to continue. See George L. Parker's Motion to Stay Proceedings in Demjanjuk v. Petrovsky, (6th Cir. 1993)(No. 85-3435), at 4. Nothing could be further from the truth. Mr. Demjanjuk is currently in Israel locked in solitary confinement under a death sentence. It is ludicrous for a former employee of the United States government to claim that the potential for reputational injury merits further delay "so that the Sixth Circuit may reconsider its procedures" while John Demjanjuk's life quite literally may hang in the balance. A speedy determination by the Sixth Circuit could have great significance, legal and diplomatic, to the proceedings in that country.

Beyond the reality of Mr. Demjanjuk's incarceration in solitary confinement under 24-hour surveillance is a simple yet powerful principle: justice delayed is justice denied. For the past fifteen years John Demjanjuk and his family have lived under the accusation that Demjanjuk was "Ivan the Terrible"--one of the most sadistic and ruthless mass-murderers in human history. This was the offense for which Mr. Demjanjuk was extradited and for which the Rule of Specialty allowed him to be tried, convicted and sentenced to death in Israel.

A court should not act on a request for mandamus where the equities do not favor issuance of the writ. Petitioner Parker

claims to be fearful that a f
or his colleagues acted fraud
extraditing John Demjanjuk fo
another person committed. Pa
writ of mandamus stopping fur
court into petitioner's own c
a circumstance runs counter t
court should exercise its sou
requested writ.

C

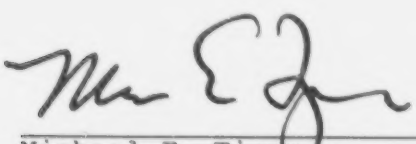
For the foregoing reas
Parker's petition for a writ

a federal court will determine that he
audulently in proceedings that led to
for crimes the evidence now shows
Parker petitions the Court to issue a
further investigation by a federal
n conduct. Issuance of mandamus in such
r to all principles of equity. The
sound discretion and withhold the

Conclusion

asons, this Court should deny George
it of prohibition or mandamus.

Respectfully submitted,



Michael E. Tigar
727 East 26th Street
Austin, Texas 78705
(512) 471-6319
(Counsel of Record)

Edward F. Marek
Office of the Federal Defender
Skylight Office Tower
Suite 750
1660 West 2nd Street
Cleveland, Ohio 44113-1454
(216) 522-4856

Attorneys for John Demjanjuk
Respondent

Supreme Court, U.S.

Nos. 92-1350 and 92-1447

In the Supreme Court of the United States

OCTOBER TERM, 1992

GEORGE L. PARKER, PETITIONER

v.

GILBERT S. MERRITT, DAMON J. KEITH, AND PIERCE LIVELY

NORMAN A. MOSCOWITZ, PETITIONER

v.

GILBERT S. MERRITT, DAMON J. KEITH, AND PIERCE LIVELY

ON PETITIONS FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a nonparty witness who has testified before a special master appointed pursuant to Rule 53 of the Federal Rules of Civil Procedure to hear a reopened extradition proceeding has the right to challenge the order appointing the special master.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Alexander v. *United States*, 201 U.S. 117 (1906)	9, 10
Bender v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986)	8
Church of Scientology v. *United States*, 113 S. Ct. 447 (1992)	9, 10
Cobbledick v. *United States*, 309 U.S. 323 (1940)	9
Demjankuk v. *Petrovsky*, 612 F. Supp. 571 (N.D. Ohio), aff'd, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986)	3
Extradition of Demjankuk, In re, 612 F. Supp. 544 (N.D. Ohio 1985)	3
Fahey, Ex parte, 332 U.S. 258 (1947)	11
FTC v. *Alaska Land Leasing, Inc.*, 778 F.2d 577 (10th Cir. 1985)	10
Karchner v. *May*, 484 U.S. 72 (1988)	9
Matter of Demjankuk, A8 237 417 (Immigration Court May 23, 1984), aff'd (BIA Feb. 14, 1985)	2
Perlman v. *United States*, 247 U.S. 7 (1918)	9
Roche v. *Evaporated Milk Ass'n*, 319 U.S. 21 (1943)	11
United States v. *Demjanjuk*, 767 F.2d 922 (6th Cir. 1985), cert. denied, 474 U.S. 1034 (1985)	2
United States v. *Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982)	2

Cases—Continued:

	Page
United States v. *Ryan*, 402 U.S. 530 (1971)	9
Will v. *United States*, 389 U.S. 90 (1967)	11

Statutes and rules:

18 U.S.C. 3184	9
Fed. R. Civ. P.:	
Rule 24	8
Rule 45	10
Rule 53	6, 7

Miscellaneous:

9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* (1993)	9
15B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* (2d Cir. 1992)	10

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1350

GEORGE L. PARKER, PETITIONER

v.

GILBERT S. MERRITT, DAMON J. KEITH, AND PIERCE LIVELY

No. 92-1447

NORMAN A. MOSCOWITZ, PETITIONER

v.

GILBERT S. MERRITT, DAMON J. KEITH, AND PIERCE LIVELY

ON PETITIONS FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals appointing a special master (92-1350 Pet. App. A9-A16), the order of the court of appeals denying petitioner George Parker's motion to rescind its order appointing a

special master (92-1350 Pet. App. A73-A74), and the order denying petitioner Norman Moscowitz's suggestion for hearing en banc (92-1447 Pet. App. A2) are unreported.

JURISDICTION

The order of the court of appeals denying petitioner Parker's motion to rescind its order appointing a special master was entered on November 4, 1992. The order of the court of appeals denying petitioner Parker's suggestion for rehearing en banc and petitioner Moscowitz's suggestion for hearing en banc was entered on December 2, 1992. The petition for a writ of mandamus or prohibition in No. 92-1350 was filed on February 1, 1993, and the petition for a writ of mandamus or prohibition in No. 92-1447 was filed on March 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

STATEMENT

1. On June 23, 1981, after a bench trial, the United States District Court for the Northern District of Ohio issued an order revoking the certificate of naturalization of John Demjanjuk. See *United States* v. *Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), aff'd, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982). Subsequently, the United States initiated deportation proceedings against Demjanjuk, and in 1984, he was ordered deported. *Matter of Demjanjuk*, A8 237 417 (Immigration Court May 23, 1984), aff'd, (BIA Feb. 14, 1985), aff'd, *United States* v. *Demjanjuk*, 767 F.2d 922 (6th Cir. 1985) (Table), cert. denied, 474 U.S. 1034 (1985).

In November 1983, the State of Israel requested Demjanjuk's extradition to stand trial for violations of Israeli's Nazis and Nazi Collaborators (Punishment) Law. *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 550-552 (N.D. Ohio 1985). The extradition court found sufficient evidence to believe that Demjanjuk had committed the crimes charged, and it certified that Demjanjuk was subject to extradition to Israel. Thereafter, the district court denied a petition for habeas corpus seeking to block Demjanjuk's extradition to Israel. *Demjanjuk* v. *Petrovsky*, 612 F. Supp. 571, 577 (N.D. Ohio 1985), aff'd, 776 F.2d 571, 576 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986).[1]

2. On June 5, 1992, the panel of the court of appeals that had affirmed the order denying Demjanjuk's petition for habeas corpus challenging his extradition to Israel issued an order stating that based on its "previous study of the record and numerous press reports," it had decided to give "[c]onsideration * * * to whether this court's refusal to grant the petition for writ of habeas corpus was erroneous." 92-1350 Pet. App. A1-A2. The order directed the government and Demjanjuk to file briefs setting forth the evidence bearing on the question whether Demjanjuk was the Treblinka guard known as Ivan the Terrible or whether another man, Ivan Marchenko, was that guard.[2] In addition, the court ordered the parties to

---

[1] In April 1988, an Israeli court found Demjanjuk guilty of crimes against the Jewish people, crimes against humanity, war crimes, and crimes against persecuted peoples at the Treblinka and Sobibor death camps, in violation of Israel's Nazis and Nazi Collaborators (Punishment) Law.

[2] During the course of Demjanjuk's appeal to the Supreme Court of Israel, the Israeli prosecutor submitted to that court

file a second brief on "the question whether the Court should reconsider its earlier decision concerning the issuance of a writ of habeas corpus in this case." *Id.* at A4.

In response to those orders, the United States filed a brief setting forth the evidence in its possession bearing on Demjanjuk's activities during the war and the identity of the operator or operators of the gas chamber at Treblinka. In addition, however, the government asserted that Demjanjuk's extradition to Israel had deprived the court of appeals of authority or jurisdiction to reopen the habeas corpus proceedings rising out of Demjanjuk's extradition.

On August 17, 1992, the court of appeals issued an order rejecting the government's jurisdictional arguments and designating a special master to determine "whether this court mistakenly affirmed the district court's denial of John Demjanjuk's habeas corpus petition." 92-1350 Pet. App. A9-A10. The court held that it had the authority to reopen the proceeding to determine whether government attorneys had perpetrated a fraud on the court by withholding evidence. The court ordered the special master to take the testimony of four Department of Justice attorneys involved in proceedings against

---

evidence obtained from Soviet Union files containing statements of Red Army soldiers who became concentration camp guards after being captured by the Germans. In some of the Soviet statements, former guards at the Treblinka death camp stated that a Ukrainian named Ivan Marchenko operated the gas chambers at Treblinka. The Israeli Supreme Court has agreed to consider all of the new evidence. As of yet, that court has not rendered a decision on Demjanjuk's appeal.

Demjanjuk: Allan A. Ryan, Jr., Norman A. Moscowitz, George L. Parker, and John J. Horrigan. The court of appeals' order then directed the special master to report to the court of appeals on the question whether Department of Justice attorneys "engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious Ukrainian guard known as 'Ivan the Terrible' who operated the gas chambers at the Treblinka." *Id.* at A10, A15.

4. Pursuant to the court of appeals' order, the special master, Judge Thomas A. Wiseman of the United States District Court for the Middle District of Tennessee, scheduled hearings to take the testimony of the attorneys named in the court of appeals' order.[3] Counsel for Demjanjuk subpoenaed petitioners George L. Parker and Norman A. Moscowitz to testify before the special master on November 11 and 12, 1992.[4]

On October 28, 1992, petitioner Parker filed a motion requesting the court of appeals to rescind its order of August 17, 1992, appointing a special master. Parker argued that in the absence of exceptional circumstances, the court of appeals lacked authority under Rule 53 of the Federal Rules of Civil Procedure

---

[3] In addition to the four attorneys named in the court of appeals' order, the special master also has heard the testimony of Martin Mendelsohn and Bruce Einhorn, two other Department attorneys involved in the proceedings against Demjanjuk, and has authorized the parties to take depositions of other witnesses.

[4] Moscowitz's testimony later was rescheduled to January 14 and 15, 1993.

to appoint a special master and that no exceptional circumstances justifying the appointment of a special master existed in this case. At the same time, Parker filed a motion with the special master seeking to stay the subpoena. On October 30, 1992, the special master denied the motion for a stay, and on November 4, 1992, the court of appeals denied the motion to rescind its August 17, 1992, order. The court of appeals' order stated: "[t]he Court for the reasons previously stated regards this case as exceptional and therefore declines to rescind its earlier order." 92-1350 Pet. App. A73. On November 6, Parker filed a suggestion for rehearing en banc of the court of appeals' November 4 order, and on November 10, Parker again sought a stay of the hearing scheduled for November 12 before the special master. The court of appeals denied the motion to stay on the same day that it was filed; the court denied the suggestion for rehearing en banc on December 2, 1992.[5]

On November 5, 1992, petitioner Moscowitz filed a motion to quash the subpoena directing his appearance before the special master and a suggestion for hearing en banc of his motion to quash. Moscowitz argued, among other things, that Demjanjuk's extradition deprived the court of appeals of jurisdiction, that Demjanjuk had failed as a matter of law to make allegations showing fraud on the court, and that the court had improperly expanded the scope of the proceeding to include the denaturalization and depor-

---

[5] Subsequently, Parker applied to this Court for a stay of the court of appeals' order dated August 17, 1992. Justice Stevens denied the application on March 18, 1993. *In re George L. Parker*, App. No. A-705.

tation proceedings against Demjanjuk. On December 2, 1992, the court of appeals denied those motions in the same order in which it denied Parker's suggestion for rehearing en banc.

3. On November 12 and 13, 1992, Parker traveled from his home in Rochester, New York, and appeared before the special master in Nashville, Tennessee. During hearings held on those dates, petitioner testified regarding his participation in the proceedings against Demjanjuk. Similarly, on January 14 and 15, 1993, Moscowitz traveled to Nashville from Miami, Florida, and testified before the special master.

ARGUMENT

Petitioners request this Court to issue a writ of mandamus or prohibition directing the court of appeals to rescind its August 17, 1992, order appointing a special master. In support of their request, petitioners renew the claims that they asserted before the special master and the court of appeals.[6] Petitioners are not entitled to relief for several reasons.

---

[6] Parker argues that the court of appeals lacked authority under Rule 53, Fed. R. Civ. P., to appoint a special master and that the court of appeals should have remanded the matter to the district court. 92-1350 Pet. 24-49. Moscowitz joins in those claims and also asserts that Demjanjuk's extradition to Israel deprived the court of appeals of jurisdiction, that the court of appeals' procedure for investigating the allegation of fraud on the court violates the due process rights of the attorneys named in the court's order, and that Demjanjuk's allegations do not establish a prima facie case of fraud on the court. 92-1447 Pet. 10-29.

First, petitioners lack standing to raise their claims. The proceeding that petitioners seek to terminate originated as a petition for a writ of habeas corpus brought by John Demjanjuk against his custodians, who were officers of the United States.[7] Petitioners were not parties to the habeas proceeding, and, as petitioners concede (92-1350 Pet. 17; 92-1447 Pet. 3), they did not become parties when the court of appeals purported to reopen the habeas proceeding by appointing a special master in 1992. Neither petitioner has taken any steps to intervene in the original habeas proceeding. See Fed. R. Civ. P. 24; *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 548 n.9 (1986).

Moreover, the relief that Demjanjuk has sought in the court of appeals and before the special master relates primarily to his extradition to Israel.[8] Demjanjuk has not sought any relief against either petitioner, and in fact has reaffirmed in his briefs in opposition to the instant petitions (92-1350 Demjanjuk Br. in Opp. 5; 92-1447 Demjanjuk Br. in Opp. 6) that "[t]he crux of the dispute in this case is whether judicial approval under 18 U.S.C. § 3184 for Mr.

---

[7] Demjanjuk brought his habeas petition against the custodian of the federal prison where he was being held at the time, the Attorney General of the United States, the Secretary of State, and the United States District Court for the Northern District of Ohio.

[8] Demjanjuk's second brief to the court of appeals asked the court to vacate the judgments in the denaturalization, deportation, and extradition cases against Demjanjuk and to issue an order directing the United States to use its best efforts to seek the return of Demjanjuk to the United States. Demjanjuk 2d C.A. Br. 60-61.

Demjanjuk's extradition to Israel was improperly procured by the Justice Department." Accordingly, because petitioners are not parties to the proceedings and because no relief is sought against them, they have no standing to file a motion seeking reconsideration of the order appointing the special master. See *Karcher* v. *May*, 484 U.S. 72, 77 (1987).

Second, neither petitioner has taken appropriate action to perfect his claim. Nonparty witnesses, such as petitioners, who wish to challenge the validity of a subpoena directing either testimony or the production of documents must move to quash the subpoena. If the court issuing the subpoena denies the motion to quash, the subpoenaed person may either comply with the subpoena or refuse to comply with the subpoena and suffer contempt. The person resisting the subpoena may obtain review of the subpoena on appeal from the contempt citation. See *United States* v. *Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 326-327 (1940). Failure to resist the subpoena and suffer contempt precludes the subpoenaed individual from obtaining review of the validity of the subpoena. *Alexander* v. *United States*, 201 U.S. 117, 121 (1906); see 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.13[2], at 123 (1993).[9]

---

[9] This case does not implicate the narrow exception to that rule for "disinterested third parties." *Church of Scientology* v. *United States*, 113 S. Ct. 447, 452 n.11 (1992); see *Perlman* v. *United States*, 247 U.S. 7 (1918). Petitioners clearly view themselves as having a "sufficient stake in the proceeding to risk contempt by refusing compliance," 113 S. Ct. at 452 n. 11; and they are required to pursue the ordinary steps required to appeal. See *FTC* v. *Alaska Land Leasing, Inc.*, 778 F.2d 577

In this case, both petitioners were subpoenaed to appear before the special master. The appropriate method to challenge the subpoena—and the order appointing the special master—was a motion to quash. Parker's failure to take this step precludes him from obtaining review by this Court.[10] *Alexander* v. *United States*, 201 U.S. at 121-122 (witness may not obtain appellate or Supreme Court review of an order requiring production of documents before a special examiner unless he disobeys the order and suffers contempt). Although Moscowitz filed a motion to quash the subpoena, he did not refuse to appear when the motion to quash was denied. Instead, he complied with the subpoena and appeared to testify before the special master. For that reason, he also is barred from raising his current claims in this Court.

Petitioners claim that they may suffer injury if the special master finds that they engaged in a fraud on the court and thus that they should be granted standing to challenge the order appointing the special master. That contention is beside the point. Petitioners had an avenue to raise their claims and protect their interest; they have simply failed to make

---

(10th Cir. 1985); 15B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3914.23, at 148 n.54 (2d ~~Cir~~. 1992) (collecting cases). *E.O.*

[10] Petitioners' position is further weakened by two other factors. First, the subpoenas were ineffective to compel their attendance before the special master. Parker works and resides in Rochester, New York, and Moscowitz works and resides in Miami, Florida. Thus, neither may be compelled to appear before a special master in Nashville, Tennessee. See Fed. R. Civ. P. 45. Second, petitioners have already complied with the subpoenas.

use of it. Having failed to invoke the appropriate route to perfect a right to appeal, petitioners may not circumvent that failure by requesting the issuance of an extraordinary writ. *Will* v. *United States*, 389 U.S. 90, 97 (1967) ("Mandamus, of course, may never be employed as a substitute for appeal * * * ."); *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947) ("Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. * * * We are unwilling to utilize them as substitutes for appeals."); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943) ("Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record.").

The cases on which petitioners rely (92-1350 Pet. 18-20; 92-1447 Pet. 3-5) to support their claim to standing to challenge the court of appeals' order appointing the special master are inapposite. In each of those cases, a court allowed an appeal by a person who had effectively become a party in the underlying action. None of those cases involved a subpoenaed witness, such as petitioners, who had an adequate means of obtaining review of the validity of their subpoenas. Moreover, to reiterate, petitioners are not parties to this proceeding, and they have not been treated as parties.[11]

---

[11] The United States has not abandoned its claim that the court of appeals lacked jurisdiction to reopen the extradition proceedings or to appoint a special master. Instead, the government has deferred seeking review of the court of appeals' interim order reopening the extradition proceeding and appointing a special master until the court of appeals panel reaches a final decision. Moreover, the government believes

CONCLUSION

The petitions for a writ of mandamus or prohibition should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

APRIL 1993

---

that Demjanjuk has produced no evidence either in the court of appeals or before the special master showing a fraud on the court. Thus, the government's cooperation with the special master and its opposition to these petitions do not constitute a waiver of its jurisdictional arguments.

Nos. 92-1350 and 92-1447

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

In re GEORGE L. PARKER,

Petitioner,

v.

GILBERT S. MERRITT, DAMON J. KEITH, and PIERCE LIVELY,

Respondents.

In re NORMAN A. MOSCOWITZ,

Petitioner,

v.

GILBERT S. MERRITT, DAMON J. KEITH, and PIERCE LIVELY,

Respondents.

ON PETITIONS FOR
A WRIT OF PROHIBITION OR MANDAMUS TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BY PETITIONERS

Charles P. Goodell, Jr.
(Counsel of Record)
Ernest G. Barnes
Geraldine Valentino
Goodell, DeVries,
Leech & Gray
25 Charles St. Suite 1900
Baltimore, Maryland 21201
(410) 783-4000
Counsel for
George L. Parker

Gerald J. Houlihan
(Counsel of Record)
David T. Azrin
Greenberg, Traurig,
Lipoff, Rosen &
Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500
Counsel for
Norman A. Moscowitz

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Petitioners Have a Sufficient Personal Stake in the Proceeding to Obtain Standing. 1

II. This Court Has Authority to Issue a Writ of Prohibition or Mandamus to the Sixth Circuit Court of Appeals at This Stage in the Proceeding 2

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Allen v. Wright,
468 U.S. 737 (1984) 1

Beacon Theatres, Inc. v. Westover,
359 U.S. 500 (1959) 3

Church of Scientology v. United States,
113 S.Ct. 447 (1992) 4

Clark v. Paul Gray, Inc.,
306 U.S. 583 (1939) 4

Cobbledick v. United States,
309 U.S. 323 (1940) 2, 3

Dunton v. County of Suffolk,
729 F.2d 903 (2d Cir. 1984) 4

FTC v. Alaska Land Leasing, Inc.,
778 F.2d 577 (10th Cir. 1985) 2

Maryland v. Soper,
270 U.S. 9 (1926) 3

Perlman v. United States,
247 U.S. 7 (1918) 3, 5

Schlagenhauf v. Holder,
379 U.S. 104 (1964) 3

United States v. Antonelli Fireworks Co.,
155 F.2d 631 (2d Cir.), *cert.*
denied, 329 U.S. 742 (1946) 2

United States v. Badger,
930 F.2d 754 (9th Cir. 1991). 5

United States v. International Brotherhood of Teamsters,
931 F.2d 177 (2d Cir. 1991) 5

United States v. Modica,
663 F.2d 1173 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982) 1

United States v. Ryan,
402 U.S. 530 (1971) 2

STATUTES AND RULES

28 U.S.C. § 1291 3

28 U.S.C. § 1651 3

Model Code of Professional Responsibility. 2

Supreme Court Rules 10, 20 3

TREATISES

R. L. Stern, E. Gressman, S. M. Shapiro, Supreme Court Practice (6th ed. 1986) 3

ARGUMENT

I. Petitioners Have a Sufficient Personal Stake in the Proceeding to Obtain Standing.

Contrary to the arguments of the Respondents, Petitioners have a sufficient personal stake in this proceeding to obtain standing. In his Brief in Opposition, Demjanjuk concedes that "in some circumstances a stigmatizing injury might be sufficient to support standing." (citing *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984)). Brief in Opposition, at 5. Here, the outcome of this proceeding may have a direct effect on the Petitioners' livelihood.

Contrary to the Respondents' suggestion, Demjanjuk is not simply seeking the reversal of the Sixth Circuit's order permitting the extradition. Rather, he seeks specific findings of attorney misconduct which he seeks to use to obtain automatic reversal of the Sixth Circuit's order. *See* Demjanjuk's Proposed Findings of Fact, at 157 (arguing that "once fraud is shown, vacatur is required"). The Sixth Circuit's stated purpose is to determine whether the attorneys, Allan Ryan, Norman Moscowitz, George Parker and John Horrigan, engaged in "prosecutorial misconduct." *See* Orders, Aug. 17, 1992, Aug. 31, 1992.[1/] While these attorneys were called as witnesses in the proceeding below, the entire proceeding has been directed toward determining whether each of these attorneys violated his individual professional obligations.[2/] At the close of the evidence, Demjanjuk

---

[1/] The personal nature of the proceeding is evidenced by the Sixth Circuit's insistence on naming the individual attorneys involved. Normally, a judicial inquiry into alleged prosecutorial misconduct does not involve the public naming of the attorney involved. *United States v. Modica*, 663 F.2d 1173, 1185 n.7 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

[2/] For example, at the initial oral argument, the panel of the Sixth Circuit questioned counsel for the United States about the particular role of each government attorney, including the Petitioners. Transcript, Aug. 11, 1992, Tape 2, at 4-6, 14-15, 28-29; Tape 3, at 4. At the special master hearing, Parker and Moscowitz were each questioned by Demjanjuk's counsel and the United States, as well as the Special Master, as to whether they had violated particular ethical rules. Hearing, Vol. I,

has submitted proposed findings of fact which include specific findings that Parker and Moscowitz violated their professional ethical obligations.[y] Demjanjuk has succeeded in "turn[ing] the trial of the accused into a trial of government counsel." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 636 (2d Cir.), *cert denied*, 329 U.S. 742 (1946). Such findings would have a direct and substantial impact on the Petitioners' reputation and profession. As Petitioners have maintained, the Department of Justice cannot adequately protect the interests of the individual attorneys. In these circumstances, the Petitioners' personal stake in these proceedings is very real.

II. This Court Has Authority to Issue a Writ of Prohibition or Mandamus to the Sixth Circuit Court of Appeals at This Stage in the Proceeding.

Contrary to the Respondents' arguments, there is no procedural bar to the issuance of a writ of prohibition or mandamus to the Sixth Circuit. In their Briefs in Opposition, Respondents mistakenly rely on a line of cases, including *United States v. Ryan*, 402 U.S. 530 (1971), *Cobbledick v. United States*, 309 U.S. 323 (1940), and *FTC v. Alaska Land Leasing, Inc.*, 778 F.2d 577 (10th Cir. 1985), for the proposition that a nonparty witness is not entitled to seek Supreme Court review without being held in contempt.

Nov. 12, 1992, at 49-51, 54-55, 122-124, 126-132, 185-187, 196-197; Vol. II, Nov. 13, 1992, at 38-39, 48-49, 73-74; Vol. III, Jan. 14, 1993, at 45-46, 127-128, 146-147, 152-153; Jan. 15, 1993, at 214-220, 238-246. At the closing argument before the special master on April 30, 1993, Demjanjuk's lawyer urged that the special master make separate determinations that Moscowitz and Parker, among others, each violated their personal ethical obligations.

[y] Demjanjuk's proposed findings include findings that Parker, Moscowitz, and others consciously disregarded their ethical obligations under the Model Code of Professional Responsibility (1980) EC 7-14 and 7-20. As legal authority for these findings, Demjanjuk relies upon the provisions of the Model Code, various court decisions addressing ethical duties, and various treatises on legal ethics. (Proposed Findings, March 29, 1993, at 112-121).

Respondents' reliance on this authority is misplaced because these cases involve review of the issuance of subpoenas by district courts, rather than circuit courts of appeals. Section 1291, 28 U.S.C., grants automatic review as of right of district court decisions by the circuit courts of appeal only where the district court decision is considered "final." This statutory provision has been interpreted to require that a nonparty witness can only obtain circuit court appellate review as of right if the witness goes into contempt. The courts impose this "finality" requirement to limit "the harassment and cost of a succession of separate appeals from various rulings to which a litigation may give rise." *Cobbledick*, 309 U.S. at 325.

In contrast, Supreme Court review of circuit court orders is not limited to "final" decisions. R. L. Stern, E. Gressman, S. M. Shapiro, *Supreme Court Practice*, § 4.18 (6th ed. 1986). Rather, the Supreme Court is authorized under the All Writs Act and the Supreme Court Rules to review any circuit court order on a petition for writ of prohibition or mandamus if such review is in aid of the Court's appellate jurisdiction to correct a clear abuse of judicial discretion or usurpation of judicial power, regardless of whether the order is considered "final." *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Maryland v. Soper*, 270 U.S. 9 (1926); *Perlman v. United States*, 247 U.S. 7 (1918); 28 U.S.C. § 1651; Supreme Court Rules 10, 20.

Here, Petitioners were faced with an order by the Sixth Circuit which compelled their compliance with the Sixth Circuit's subpoena. In this situation, the Petitioners should not have been required to be held in contempt prior to obtaining Supreme Court review because this Court's discretionary review authority does not depend on whether the circuit court order is final. Because the fact-finding investigation was improperly being conducted by the Sixth Circuit[4/]

[4/] Petitioners have urged that this proceeding should have been remanded to the District Court in the first instance.

rather than the District Court, the Petitioners' only avenue to obtain appellate review was by discretionary Supreme Court review.[3/]

Contrary to the Respondents' claim, the fact that the Petitioners' have already testified does not moot their claims. Petitioners did not object merely to the fact that they were required to give testimony. Rather, they objected to the Sixth Circuit's authority and jurisdiction to conduct the entire proceeding.[4/] A federal court is permitted to consider its own jurisdiction at any stage in the proceeding, on its own motion or at the suggestion of the parties. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588 (1939); *Dunton v. County of Suffolk*, 729 F.2d 903, 910 (2d Cir. 1984). The fact that

---

[3/] Contrary to the Respondents' suggestion, allowing the Petitioners to obtain Supreme Court review in this case will not open the door for every witness appearing before a district court to obtain appellate review without being held in contempt. Rather, the rule urged here will only apply in the future where: (1) a circuit court, rather than a district court, is conducting a fact-finding investigation and issues an order compelling compliance with its subpoena, and (2) Supreme Court review is authorized under the Court's discretionary authority on the ground that the circuit court is acting beyond its judicial power.

[4/] Demjanjuk mischaracterizes the Petitioners' objections when he suggests that the Petitioners objected to the proceeding because they were concerned about the possible adverse publicity which might surround their testimony. See Brief in Opposition to Parker Petition, at 17-18, Brief in Opposition to Moscowitz Petition, at 11-12 (arguing that Petitioners' objections are moot because "[t]his testimony was widely covered in the national press" and "all of the evidence surrounding his involvement with the Demjanjuk case is now a matter of public record"). Their objection was specifically to having to testify in this proceeding.

Moscowitz and Parker object to the Sixth Circuit proceeding because: 1) the Sixth Circuit does not have jurisdiction to reopen the habeas corpus proceeding after Demjanjuk has already been extradited to stand trial in Israel; 2) the Sixth Circuit improperly delegated the proceeding to a special master; 3) the Sixth Circuit failed to remand the investigation to the District Court to conduct the investigation in the first instance; 4) the Sixth Circuit has failed to protect the due process rights of the individual attorneys because of its denial of certain procedural safeguards; and 5) the Sixth Circuit has improperly given Demjanjuk the lead role as the "prosecutor" in conducting the investigation.

the Petitioners have already testified does not moot the Petitioners' substantive objections to the Sixth Circuit's jurisdiction to conduct this proceeding. *Church of Scientology v. United States*, 113 S.Ct. 447, 452 (1992). Furthermore, Petitioners should not be required to await a decision by the Sixth Circuit before seeking Supreme Court review. This Court has authority to correct the Sixth Circuit's usurpation of judicial power before the Sixth Circuit proceeding continues any further.

Contrary to the Respondents' suggestion, Petitioners are permitted to obtain appellate review of the Sixth Circuit's actions even though they have not formally intervened as parties. A nonparty may appeal an order whenever he has an interest that is affected by the court's judgment and the equities weigh in favor of hearing the appeal. In these circumstances, the nonparty is not required to intervene as a formal party. *See, e.g., Perlman v. United States*, 247 U.S. 7 (1918); *United States v. International Brotherhood of Teamsters*, 931 F.2d 177, 183-84 (2d Cir. 1991); *United States v. Badger*, 930 F.2d 754, 756 (9th Cir. 1991); and cases cited in Moscowitz Petition, at 3 and Parker Petition, at 20-21.

CONCLUSION

For all of the foregoing reasons, Petitioners pray that this Court grant the Petitions for Writ of Prohibition or Mandamus.

Charles P. Goodell, Jr.
(Counsel of Record)
Ernest G. Barnes
Geraldine Valentino
Goodell, DeVries, Leech & Gray
25 S. Charles St. Suite 1900
Baltimore, MD 21201
(410) 783-4000
Counsel for
George L. Parker

Gerald J. Houlihan
(Counsel of Record)
David T. Azrin
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0500
Counsel for
Norman A. Moscowitz

May 1993